Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MATTHEW CATE, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS, *Petitioner*,

v.

MOHAMMED HAROON ALI, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMMED HAROON ALI,
Petitioner-Appellant,

v.

RODERICK Q. HICKMAN, Director
California Department of Corrections
Respondent-Appellee.

No. 07-16731

D.C. No. CV-05-05243-PJH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted
December 12, 2008—San Francisco, California

Filed July 7, 2009
Amended October 23, 2009

Before: A. Wallace Tashima and Marsha S. Berzon,
Circuit Judges, and Robert J. Timlin,*
District Judge.

Opinion by Judge Berzon

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*The Honorable Robert J. Timlin, United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Albert Joel Kutchins, Berkeley, California, for the petitioner-appellant.

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ORDER

The opinion was filed on July 7, 2009, and published at 571 F.3d 902, is hereby amended as follows:

1. Slip Op. 8263, line 36: Replace <"reasonable" and demonstrated that the peremptory challenges had not been motivated by the juror's race.> with <"reasonable.">

2. Slip Op. 8264, line 14: Replace <agreed with the trial court's conclusion> with <concluded>

With these amendments, the panel has unanimously voted to deny the petition for panel rehearing. Judge Berzon has voted to deny the petition for rehearing en banc, and Judges Tashima and Timlin recommend denial.

The full court has been advised of the petition for rehearing en banc, and no judges of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are DENIED.

No further petitions for rehearing or rehearing en banc may be filed.

OPINION

BERZON, Circuit Judge:

In 2001, a California state court jury convicted Petitioner-Appellant Mohammed Ali of the first-degree murder of his girlfriend, Tracey Biletnikoff. During jury selection, the prosecutor, Stephen Wagstaffe, peremptorily struck the only two African-American members of the jury pool. Ali maintains that these strikes were racially-motivated and therefore violated his rights under the Equal Protection Clause of the Fourteenth Amendment. *See Batson v. Kentucky*, 476 U.S. 79 (1986). We hold that a comparative juror analysis, in combination with other facts in the record, demonstrates that the prosecutor's purported race-neutral reasons for striking at least one of the jurors were pretexts for racial discrimination. We further hold that the California Court of Appeal's contrary conclusion was not only incorrect, but unreasonably so. Accordingly, we reverse the district court's denial of Ali's petition for writ of habeas corpus and grant the writ.[1]

I. Background

A. Jury Selection

On November 8, 1999, the State of California charged Mohammed Ali with the first-degree murder of his girlfriend, Tracey Biletnikoff. Ali entered a plea of not guilty, and stood trial.

During the jury selection process, the state prosecutor used two of his peremptory challenges to strike the only African-Americans in the jury pool, first striking M.C.[2] and then Darrell Jefferson. Ali's

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[1] Ali also raised several ineffective assistance of counsel claims in his habeas petition. Because we grant Ali's petition based on his *Batson* challenge, we do not reach these additional claims.

[2] We refer to this juror by her initials in order to protect her privacy.

trial counsel challenged both these strikes in turn under *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) (California's equivalent of *Batson*), requesting an evidentiary hearing on the issue of the prosecutor's motive. After the prosecutor struck Jefferson, the trial judge granted the request. At the ensuing hearing the prosecutor provided the following explanation for his strike of M.C.:

> M.C.—yesterday, I exercised my challenge there for the following reasons: We had an out-of-the-presence-of-the-jurors discussion with her about private matters wherein she talked about family members and the discussion with those involving the molestation of one child by another child, the involvement in the system. The way she described that, she ultimately told the Court she thought that that would not play a role, would not affect her judgment. Her words were that she doesn't think it will affect her judgment in this case. She did not say it won't. She said she doesn't think on that. It did involve family members within the system. That was, level one, a concern that I had. I have exercised challenges to other jurors for that same reason.
>
> No. 2, she was very emphatic that—about—to Mr. Morales, and then to me later, about her concerns about attorneys and the ways they conducted themselves in the courtroom; that if it was anything less than professional and respectfully done that that would affect her.
>
> THE COURT: Would that be an unreasonable expectation?
>
> PROSECUTOR: It would not be an unreasonable expectation to say; that it would occur to say it would affect her judgment was unreasonable. That's why Mr. Morales initially dealing on this issue

followed up with that with her to say there were times he might cross-examine witnesses in an aggressive fashion and do that, to find out whether that would affect her judgment of him on that. I then followed up with her in my questioning to inquire about the same things. I thought we would act respectfully, but did she think it would affect her. Her demeanor, and the way she responded to that made it very clear to me that something she would—I think all of us would like to have occur, I expect it will occur, but as Mr. Morales has properly pointed out to several jurors, at times there could be an aggressive approach to the case; that sometimes there may not. That gave me cause for concern, more so, of course, is the prior involvement in the prior offense.

No. 3, Your Honor, the question was posed to her and it was posed by the defense about what she felt in terms of sitting in judgment of others. Her response to that was a pause, reflection, and then she said, yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith. Mr. Morales then explored that with her and went further into, Well, what we would be talking about here is judging facts and that type of a matter. She thought about it and said, Well, taking that into consideration, I believe that is something I could do without crossing my religious tenets. I thought there was hesitancy in what she said.

Obviously, it is my burden to get twelve jurors who could judge the case. I thought a combination of these factors gave me good reason to be concerned about her ability to fairly and impartially do it, and I

exercised a peremptory challenge for that reason and for that reason alone.

The trial court then asked the prosecutor to provide his reasons for striking Darrell Jefferson, to which he responded:

> I though Mr. Jefferson was an excellent juror up until the questioning here, based on what he did—you recall he came in and engaged in some banter with the Court when he was talking about his hardship request; that he—I believe it was a hardship, not publicity, inquiry that was done in chambers. As the Court stated a few minutes ago, when you expressed it, there were two things that caused me to change my mind. One of them was in response to Mr. Morales' question. That question had to do with there was something—where he talked about, we make decisions as we go along. It gave Mr. Morales some concern. It gave me some concern.
>
> Mr. Morales explored it a bit further with him. Well, wait. You can't make the decision. He said, Well, we do it. That's how life works. I know—and he said, We may change them as we go along but we make decisions. I have a phenomenally great concern about the intellectualizing. I thought that would do—it would be an over-intellectualizing of the case.
>
> I want jurors, what I think Mr. Morales was striving for with him, about keeping an open mind until the end and not making decisions. The Court arrived at a conclusion there that that may be a semantical difference or something else, and I respect that conclusion, when you told Mr. Morales [during Jefferson's voir dire] to move on, but it gave me cause for concern there.

But at that point, I was still considering the peremptory challenge, because evident to me when in response to a question from me he gave what—and it's personal to me. I respect it may be. I thought he gave me, and I respectfully use these words, a smart-ass answer.

THE COURT: Which [response]?

PROSECUTOR: The one when I commented to him, Is there anything else that you could think of that would cause you not to be fair and impartial, a question I have asked probably of over 50 jurors, 40 jurors in this case and never received other than no or maybe some answer. His was, I haven't done anything yet, immediately provoking a barrel of laughter throughout the courtroom. I was offended by that comment.

By those two things, combined with the fact that he had had some contact, although he said he could lay it aside, and I respect that possibility, with dealing with a public defender and hearing about those cases.

That combination of things caused me to change my mind. Race had nothing to do with either of these things.

Those are my reasons, Your Honor.

THE COURT: What was the reason again about the hardship that you assert, Mr. [prosecutor?]

. . .

PROSECUTOR: My comment was, when [Jefferson] came in and spoke with you in the hardship—I am relaying to the Court my thought process—and the banter he engaged in. I thought it was light-hearted. It was not the hardship itself that

concerned me. I thought it was a lighthearted banter, but I thought it reflected—the word I'm looking for is not disrespectful, but I thought it reflected a casualness that was not typical of jurors.

Again, this is a very subjective item and in and of itself would never give cause, but what I noted was the banter he engaged in was very much at ease, and that is not what I'm looking for in a juror; however, again, I would never exercise a challenge on that alone. That is merely factors that go into it. I've given you four factors I believe that went into that decision.

THE COURT: With all due respect, I thought I heard two, one having to do with his banter and, slash, casualness during the hardship discussion; and, two, the response to the question you had asked that elicited laughter in the courtroom and then the—make that three—the judgment back and forth and mindchanging.

What was the fourth one?

PROSECUTOR: Yes, I understand. The fourth one was the contact that he had had with cases where he had been—briefed may be too strong a word, but he had had a rundown from his brother, who was an appellate defender, on some case before the Supreme Court. Hearing about that, that gave me cause for concern.

After providing Ali with an opportunity to respond to these explanations, the trial court denied Ali's *Wheeler* motion. The court concluded that the prosecutor's proffered justifications were "reasonable" and demonstrated that the peremptory challenges had not been motivated by the juror's race. In reaching this conclusion, the trial court did not consider comparative evidence regarding the responses of M.C. and Darrell Jefferson and the

responses of non-African American members of the jury pool during the jury selection process.

Following the denial of Ali's *Wheeler* motion, the case proceeded to trial. After three days of deliberations, the jury found Ali guilty of first-degree murder. He was sentenced to 55 years to life in state prison.

B. California Appellate Proceedings

The California Court of Appeal affirmed Ali's conviction on direct appeal in an unpublished opinion. With respect to Ali's *Wheeler/Batson* claim, the appeals court agreed with the trial court's conclusion that "[t]he jury selection process was not marred by purposeful discrimination," holding that "substantial evidence support[ed] the trial court's finding that the peremptory challenges were exercised without a discriminatory purpose." Like the trial court, however, the California Court of Appeal did not engage in comparative juror analysis. At the time, California law did not permit a court to conduct comparative analysis for the first time on appeal. *See People v. Johnson*, 30 Cal.4th 1302, 1325 (2003), *rev'd sub nom. Johnson v. California*, 545 U.S. 162 (2005).[3]

In a separate order, the California Court of Appeal denied Ali's state habeas corpus petition without further analysis. The California Supreme Court denied Ali's petition for review and, later, rejected his state habeas petition in a one-lined disposition.

C. Federal Habeas Proceedings

Ali thereupon filed a federal habeas petition. The district court, unlike the California courts, performed a comparative juror analysis during its evaluation of Ali's *Batson* claim. In doing so, the

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[3] California courts are now required to conduct a comparative juror analysis even if such an analysis was not performed by the trial court. *See People v. Lenix*, 44 Cal.4th 602 (2008).

court found that such an analysis "called into question" two of the prosecutor's reasons for striking M.C. Nevertheless, the court concluded that:

> While the instant comparative juror analysis does reveal some minor faults in the prosecutor's reasoning, the court finds that these faults do not demonstrate racial bias or pretext. The court further finds that the prosecution's race-neutral justifications were sufficiently credible, clear, and reasonably specific. It therefore concludes that based on the totality of relevant facts, Ali has not shown purposeful discrimination . . . .

Ali asks this Court to reverse that decision.

II. Legal Standards

A. The *Batson* Framework

[1] The Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on the basis of their race. *See Batson*, 476 U.S. at 89. We apply a now-familiar three-part test when evaluating a defendant's equal protection challenge to a prosecutor's use of peremptory strikes. *See id.* at 96-98; *see also Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (en banc): First, the defendant must make a prima facie showing that a challenge was based on race. *See Kesser*, 465 F.3d at 359. If such a showing is made, the burden then shifts to the prosecutor to produce a "clear and reasonably specific" race-neutral explanation for challenging the potential juror. *See id.* Third and finally, the court must determine whether, despite the prosecutor's proffered justification, the defendant has nonetheless met his burden of showing "purposeful discrimination." *See id.* To make this last determination, the court evaluates the "totality of the relevant facts" to decide "whether counsel's race-neutral explanation for a peremptory challenge should be believed." *See id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). The

consideration of "purposeful discrimination" at step three of the *Batson* inquiry is a factual one. *See Batson*, 476 U.S. at 98 n.21 ("[A] finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court.") (internal quotation marks and citations omitted); *see also Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Here, neither party challenges the trial court's conclusion that Ali established a prima facie case and that the prosecutor satisfied his step two burden by providing specific race-neutral explanations for his strikes of M.C. and Darrell Jefferson. The sole issue therefore is whether the California courts and the district court erred in concluding that Ali had failed to meet his ultimate burden of establishing that the prosecutor's challenges were motivated by purposeful racial discrimination.

B. The Standard of Review

1. Review of the State Court's Decision

Section 2254(d)(2) of Title 28, United States Code governs our review of the state appellate court's finding that the prosecutor did not engage in purposeful discrimination. *See Kesser*, 465 F.3d at 358 & N.[sic]1.[4] Pursuant to §2254(d)(2), we must defer to the California appellate court's conclusion

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[4] Relying on our opinion in *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), we held in *Kesser* that § 2254(d)(2), rather than § 2254(e)(1), governs our review of a state court's factual determination of the presence or absence of discriminatory animus where our review is based entirely on information that was contained in the state court record. *See Kesser*, 465 F.3d at 358 n.1. In this case, as in *Kesser*, the relevant evidence is found in answers to juror questionnaires and a transcript of voir dire, both of which were before the California Court of Appeal. Section 2254(d)(2) therefore applies. We note, however, that, also as in *Kesser*, "the question of which AEDPA standard we apply [is] academic, because the record satisfies either standard." *See id.*

that there was no discrimination unless that finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(2).[5]

2. Review of the District Court's Decision

We review *de novo* a district court's denial of a habeas corpus petition. *See Juan H. v. Allen*, 408 F.3d 1262, 1269 n.7 (9th Cir. 2005). If the district court makes independent factual findings, we review those findings for clear error. *See id.* If the district court does not make independent factual findings, we simply review the state court's findings under § 2254(d)(2), as discussed above.

In this case, the district court reviewed the state court record *de novo* and, after conducting a comparative juror analysis, found that the prosecutor did not act with a racially discriminatory motive when he peremptorily struck M.C. and Darrell Jefferson. Although the district court reviewed the state court record independently, its ultimate factual finding on the issue of the prosecutor's discriminatory intent was one that had already been made by the California Court of Appeal. Moreover, the district court's conclusion was based entirely on information that had been before the California appellate court. As a result, the district court did not make any factual findings that were independent of those made by the state appellate court. As both we and the district court are therefore obliged to review the California Court of Appeal's decision under the reasonableness standard provided in § 2254(d), we review the district court's *Batson* analysis *de novo*.[6]

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[5] For AEDPA purposes, we evaluate the state court's last reasoned decision as the basis for the state court's judgment. *See Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002). In this case, that decision was the California Court of Appeal's opinion affirming Ali's conviction on direct appeal.

[6] For the reasons discussed below, the district court's

(continued...)

III. Discussion

A. A Prosecutor's Challenge of Juror M.C.

The prosecutor provided three reasons for his decision to strike M.C. First, he stated that he was concerned that M.C.'s judgment and objectivity as a juror might be adversely affected by the fact that her daughter had been the victim of an attempted molestation by the daughter's half-brother. Second, he said that he excused M.C. because she had indicated that "anything less than professional and respectful[]" conduct on the part of the attorneys might affect her view of the case. He explained that although it was reasonable for her to expect the attorneys to act professionally, he was concerned that she would react negatively to aggressive cross-examination. Finally, the prosecutor asserted that he struck M.C. because she had said that she might have trouble "sitting in judgment of others" due to "her Christian faith."

Without evaluating each of these justifications individually or performing comparative juror analysis, the California Court of Appeal concluded that "substantial evidence support[s] the trial court's finding that the peremptory challenge[] [of M.C. was] exercised without discriminatory purpose." The district court, however, did evaluate each of the proffered justifications one at a time and conducted comparative juror analysis. It found that such an analysis largely, although not entirely, undermined the prosecutor's first justification and wholly failed to support the second. At the same time, the court concluded that a comparative analysis buttressed the prosecutor's third explanation and that, "on balance,"

(...continued)
finding that the prosecutor did not act with a discriminatory motive when he struck M.C. was clearly erroneous. Therefore, even if we considered that finding to be an independent one, we would not uphold it.

Ali had not shown that the prosecutor's removal of M.C. was motivated by "purposeful discrimination."

Our own review of the record convinces us that each of the prosecutor's justifications is logically implausible, undermined by a comparative juror analysis, and otherwise unsupported by the record. As we held in *Kesser*, where "an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's non-racial grounds," we are "compell[ed] [to conclude] that his actual and only reason for striking [the relevant juror] was her race." *Kesser*, 465 F.3d at 360. Such a conclusion is compelled in this case. The California Court of Appeal's contrary finding was not only incorrect, but an "unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

1. Reason 1: The Attempted Molestation of M.C.'s Daughter

On her juror questionnaire, M.C. indicated that she had had contact with law enforcement "when [there] was an attempt of molestation of my daughter." M.C. then discussed this response during private voir dire. The discussion transpired as follows:

> COURT: [On your questionnaire you wrote] private, "When there was an attempt of molestation of my daughter." That's the area you would like to explore privately, right?
>
> M.C.: Uh-huh.
>
> COURT: How old was your daughter?
>
> M.C.: My daughter was 14.
>
> COURT: How old is she now?
>
> M.C.: She is 22.
>
> COURT: This is about eight years ago?
>
> M.C.: Yes.
>
> COURT: Who was the supposed molester?

M.C.: Her brother.

COURT: Was he living at home with you as well?

M.C. No. It's a child by another lady that was visiting our home. Because he had been having problems with where he lived with his mom, and he was staying with us.

COURT: Was your significant other or your husband the father of this boy?

M.C.: Yes.

COURT: I'm sorry?

M.C.: Yes.

COURT: So he was at some other home having problems there, and I take it that you agreed and your husband wanted to help him out by having him live with you?

M.C.: Yes.

COURT: How long was he in the home before this happened?

M.C.: I would say about three months.

COURT: Was it reported to the authorities?

M.C.: Yes.

COURT: In this county or elsewhere?

M.C.: In this county.

COURT: What happened? By the way, how old was he when this happened?

M.C.: He was about 17 years old.

COURT: So what happened?

M.C.: There was an incident, my daughter came to our room and reported it to us, and I called the police department, and the police came and they arrested the young man and took him to Juvenile Hall.

Because he resided, his home residence was in Santa Clara County, they took him from San Mateo County to Santa Clara County, and he was in Juvenile Hall until we had—I call it a trial, court, whatever. And we went to court, and then they put him on a probation where he couldn't be in contact with her for, you know, x number of years.

COURT: Did your daughter testify in that court hearing?

M.C.: Yes. In a private chamber.

COURT: Is that the only incident that you were asking to have us discuss privately?

M.C.: Yes.

COURT: That's the only time that that molestation occurred was that one incident?

M.C.: Yes.

COURT: How do you think that incident and all of its ramifications, going to court and all of that, might influence you in this case?

M.C.: I really don't think—I don't think it would have any bearing. I don't know. I don't think it would. My daughter is 22 years old. She didn't have to have—we all had to do family counseling.

COURT: Did family counseling help her deal with the molestation?

M.C.: Yes. I know that it does still affect her even though she is 22 years old, and we have discussed it recently, before I was called to jury duty. It still has an effect on her. However, I didn't want it to be discussed in open court—

COURT: Don't worry about it.

M.C.: —in open session, so I thought I would put it out there.

COURT: You don't have to apologize for putting "private" on there. That's why we have these processes. Was it the East Palo Alto Police Department or was it the sheriff's office that did the investigation?

M.C.: I believe it was the sheriff's department.

COURT: Do you remember who the investigating officer was?

M.C.: No.

COURT: Anything about their the law enforcement angle, the local police department, whether it was the police or the sheriff, did you feel that they treated you with respect and your daughter with respect as a result of all of this?

M.C.: Yes.

COURT: Did you think it was a fair process that you had to go through and your daughter had to go through?

M.C.: Yes.

COURT: Would there be any lasting effect on either the defense or the prosecution in this case as a result of your experiences or knowledge about that?

M.C.: No.

COURT: Mr. Morales, any questions?

DEFENSE: No questions.

COURT: Mr. [Prosecutor]?

PROSECUTION: No.

According to the prosecutor, this exchange provided the first race-neutral reason for his

dismissal of M.C. He described that reason as follows:

> M.C. —yesterday, I exercised my challenge there for the following reasons: We had an out-of-the-presence-of-the-jurors discussion with her about private matters wherein she talked about family members and the discussion with those involving the molestation of one child by another child, the involvement in the system. The way she described that, she ultimately told the Court she thought that that would not play a role, would not affect her judgment. Her words were that she doesn't think it will affect her judgment in this case. She did not say it won't. She said she doesn't think on that. It did involve family members within the system. That was, level one, a concern that I had. I have exercised challenges to other jurors for that same reason.

The district court perceived this explanation as revealing not one, but two concerns that the prosecutor had with M.C. as a juror. The prosecutor's first concern, according to the district court, was that M.C.'s equivocal initial response to the trial court's question about how the child molestation incident might influence her ability to sit as a juror in Ali's case indicated that she might not be able to judge the case objectively. The district court described the prosecutor's second qualm as a "concern with [M.C.'s] involvement in the criminal justice system . . . ."

In evaluating these two expressed bases for striking M.C., the district court concluded that a comparative juror analysis undermined the prosecutor's first purported concern but supported the second, because "the prosecutor's concern with a potential juror's, including M.C.'s, involvement in the system was legitimate and consistently applied without apparent discriminatory purpose."

As explained below, we agree with the district court's conclusion that a comparative juror analysis, as well as other evidence in the record, thoroughly undermines the prosecutor's alleged first concerns with M.C.'s objectivity. We disagree, however, with the court's determination that the prosecutor was legitimately troubled by M.C.'s "involvement in the system." As to the second concern, contrary to the district court's assertion, a comparative juror analysis reveals that the prosecutor did not "consistently" strike jurors who had experience with the criminal justice system. In fact, he accepted at least two white jurors who had more problematic experiences than M.C. Thus, even if we assume, like the district court, that the prosecutor's first explanation for his strike of M.C. conveyed two distinct concerns, a review of the record, including comparative juror analysis, compels the conclusion that both the alleged justifications were pretextual make-weights.

1.a. M.C.'s Objectivity

[2] The prosecutor's assertion that he excused M.C. because she initially hesitated when responding to the court's inquiry about the effect of the molestation incident on her ability to judge Ali's case is wholly unpersuasive, for several reasons.

[3] First, to the extent that the attempted molestation of her daughter might affect M.C.'s impartiality, any bias on M.C.'s part logically would favor the prosecution, not the defense. To be believable, a prosecutor's "[r]easons must be 'related to the particular case to be tried.'" *Kesser*, 465 F.3d at 359 (quoting *Batson*, 476 U.S. at 98). In this case, the victim, Tracey Biletnikoff, was, like M.C.'s daughter, a young woman and the victim of a domestic assault.

Moreover, M.C.'s description of the molestation focused entirely on the effect that the incident had on her daughter, with whom M.C. still lives. She stated, for example, that "I know that [the molestation incident] does still affect [my daughter] even though she is 22 years old, and we have discussed it recently,

before I was called to jury duty. It still has an effect on her." When the trial court asked M.C. if the incident might influence her in evaluating Ali's case, M.C. again focused on her daughter, stating "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would. *My daughter is 22 years old.* She didn't have to have—we all had to do family counseling." (emphasis added) If anything, then, M.C.'s experience and her description of that experience would suggest that she was more likely than the average juror to identify with the *victim* of the crime.

The State disagrees with this assessment of M.C.'s potential bias, arguing instead that the molestation incident reveals that M.C. may have "harbored some sympathy" for the perpetrator of the daughter's molestation, M.C.'s stepson. This view simply cannot be squared with the record.

Tellingly, M.C. never refers to the perpetrator as either her son or her stepson. Instead, she describes him alternately as "[my husband's] child by another lady," "the young man," and her daughter's "brother." In addition, M.C. stated that the stepson had only lived with the family for three months prior to the incident and was prohibited from contacting her daughter for several years afterwards. There is absolutely no indication that M.C. had any affection for, sense of family responsibility for, or ongoing relationship with the perpetrator.

The State nevertheless tenders the following "evidence" of M.C.'s alleged sympathy for the stepson: First, the State argues that "although her stepson received what could be perceived as a light sentence for a molestation that still affected her daughter eight years later, [M.C.] indicated that she thought the process had been fair." The State then suggests, absurdly, that "even though the molestation was apparently serious enough to merit police intervention and juvenile court proceedings, [M.C.] *appeared to minimize* the incident by referring to it as an 'attempt of molestation' in her juror questionnaire." Attempted sexual battery is a serious crime in California, *see People v. Dixon*, 75

Cal.App.4th 935, 942 (1999), and could certainly trigger law enforcement action. Nothing in the record indicates that there was actual, as opposed to attempted, molestation. The State's suggestion that M.C. "appeared to minimize" the incident, rather than to report it accurately, is therefore wholly without merit.

Two sentences later the State lurches further from the record when it writes, "Indeed, we note that the prosecutor seemed genuinely concerned about [M.C.'s potential sympathy for the defendant], and questioned [M.C.] about whether she might identify with Ali because she had a son in the same age range whom she might be able to picture in the same circumstances." It is true that the prosecutor asked M.C. about having a son the same age as Ali. And it is also true that M.C. expressed some concern over that fact. However, it is equally clear that M.C. was referring to her *biological* son, with whom she and her daughter live.

Contrary to the State's contention, then, there is no evidence in the record from which the prosecutor could have inferred that M.C. harbored sympathy for the stepson. She mentioned him only briefly, did not refer to him as her son or stepson, and expressed clearly and repeatedly her ongoing concern for her daughter and her daughter alone. It is little wonder that neither the prosecutor nor the State put forward this explanation previously.

[4] Second, a comparative juror analysis reveals, as one might expect, that the prosecutor *favored* jurors who had been the victims of domestic abuse or who had friends who had been victims of domestic abuse or who had friends who had been victims of such abuse, even if the juror indicated that his or her experiences might affect his or her objectivity. Indeed, as in *Kesser*, "it seems that experience with domestic violence and abuse was no a liability, at least in the prosecutor's view. In fact, he might have found [a] woman a good juror precisely *because* she was the mother of a vulnerable daughter who, like [Ali's girlfriend,] had fallen victim to abuse." 465 F.3d at 367.

Juror 6, for example, described during voir dire an event that culminated in her husband's arrest: The husband, while drunk, began to physically abuse the couple's 15 years old son. When Juror 6 intervened, her husband shoved her backwards into the oven door, hard enough to incapacitate Juror 6. The police were called and the husband arrested. Although he spent a night in jail, no charges were filed.

As in M.C.'s case, the court asked Juror 6 whether the incident would influence her objectivity when evaluating Ali's case. She replied,

> I think I would be fair and impartial. It did affect me. I do believe that people do things under the effects of certain drugs or alcohol and maybe they wouldn't ordinarily do.

Two questions later, she clarified that she thought drug use was "a factor to evaluate," but did not automatically excuse murder. She was not asked follow-up questions regarding her objectivity.

Juror 6's status as the direct victim of domestic violence provided her with a slightly closer connection to Biletnikoff than M.C., who was the mother of the victim. Nonetheless, it is difficult to see how her response to the court's question about how the incident would affect her objectivity was less equivocal than M.C.'s initial response. Compare Juror 6 ("I think I would be fair and impartial. It did affect me.") with M.C. (first stating "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would[,]" but then answering an unequivocal "No" when asked "Would there be any lasting effect on either the defense or the prosecution in this case as a result of your experiences or knowledge about that?"). In addition, Juror 6, unlike M.C., did express some sympathy for the perpetrator, noting that "people do things under the effects of certain drugs or alcohol that maybe they wouldn't ordinarily do." This statement is particularly relevant in this case, because evidence introduced at trial showed that Ali was a chronic

drug user and had been using drugs and alcohol on the days preceding Biletnikoff's murder.

A comparison of M.C. to Juror 8 is likewise instructive on this point. Like M.C., Juror 8 had experience with domestic violence. During voir dire, she explained that she had "several close friends who have been . . . sexually assaulted by some male figure in their life." She also stated that she had a close friend whose father had attempted to kill the friend's mother. When asked how these experiences might affect her approach to this case, she responded,

> I guess what I was trying to say in the questionnaire was that if I learned that there had been some kind of conflict with, you know, the defendant and the Biletnikoff woman, I might be more sympathetic with the victim.

In the questionnaire itself, she had written, "I believe that my friend's experiences with sexual abuse by men will make me biased against any man who may have assaulted or murdered a woman." Although she later stated that she could "look at [the case] objectively," she had the following exchange with Ali's attorney after making that statement:

> Q. This is indeed a domestic violence case. How do you think you would be as a juror sitting on this case having those experiences or at least through your friend?
>
> A. I cannot say that would not be part of my opinion in my thought process. I wouldn't make a decision just based on the fact that this involves domestic violence. A defendant here shouldn't be guilty just because of that. It's not that. That plays into my thought process, though.
>
> . . .
>
> Q. Saying that statement, from what I'm hearing, there may be a little bit of bias if

you sat as a juror on this case; is that correct?

A. That's correct.

The prosecutor's failure to strike Juror 8 substantially undermines one of his supposed reasons for striking M.C.—that he was concerned about selecting a juror whose past experiences with domestic violence might affect her objectivity as a juror. Juror 8 acknowledged, at several points, that she might have problems remaining impartial if the case involved domestic violence. In addition, Juror 8's statements were far more equivocal than M.C.'s. She vacillated from "I might be more sympathetic with the victim" to "I could look at [the case] objectively" and then back to "there may be a little bit of bias if [I] sat as a juror on this case."

In short, the prosecutor's reason for striking M.C.—her equivocal response to a question about the impact of a domestic violence incident on her objectivity—applies with equal or greater force to Jurors 6 and 8, both of whom he accepted. "The fact that [a proffered] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext." *Miller-El*, 545 U.S. at 248.

The State argues that a potential juror, D.W., whom the prosecutor peremptorily struck from the jury, not Jurors 6 and 8, is the most appropriate person for a comparative analysis as to the prosecutor's explanation regarding experience with domestic violence. D.W., like M.C., described an incident involving the molestation of one family member by another. In D.W.'s case, his eight-year-old son had molested his two-year old daughter.

A comparison of M.C. to D.W., however, only confirms that the prosecutor was concerned with the *direction* of a juror's bias, not with objectivity. As noted, M.C.'s discussion of her daughter's molestation was focused entirely on the effect that the incident had had on her daughter's life. M.C. mentioned the alleged perpetrator, her husband's son by another woman, only briefly and only to point out

that the boy had been living with her family for a very short time and was subsequently prohibited from contacting her daughter.

By contrast, the focus of D.W.'s discussion was almost exclusively on the actions of his son, the perpetrator of the crime. He even suggested that his daughter, the two-year-old victim, did not remember and so was not affected by the incident. The reasonable inference, then, was that D.W. might be more sympathetic to Ali than the average juror.

More importantly, D.W. *actually expressed* a bias in favor of the defendant:

> DEFENSE: Can you give [the prosecution] a fair case? Can you give them a fair shake?
>
> . . .
>
> D.W.: I think I can give the prosecution a fair shake.
>
> DEFENSE: How about the defense?
>
> D.W.: I'm certain I can give the defense a fair shake.

M.C., on the other hand, never expressed a preference for the defense. She simply indicated originally that she did not think the molestation incident would affect her and, in the end, stated unequivocally that it would not.

[5] An analysis of the record supplies a third reason why the prosecutor's alleged concern with M.C.'s objectivity is implausible: his failure to clear up any lingering doubts about M.C.'s objectivity by asking follow-up questions. *See Kesser*, 465 F.3d at 364 (" 'We expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.'") (quoting *Miller-El*, 545 U.S. at 244). After the trial court finished asking M.C. about the molestation incident, including questions about how the incident might affect her objectivity, the court provided the prosecution with an opportunity to ask questions of his own. He did not do so.

This failure to seek clarification is even more striking in light of the fact that the prosecutor *did* ask a follow-up question on potential bias during the private voir dire of potential juror D.W., who, as noted, also relayed a molestation incident involving family members. At the end of D.W.'s interview, the trial court asked, "How do you think the circumstances of this incident would influence you here in this case?" D.W. responded, "I don't think they have any impact whatsoever." At that point, the judge asked the prosecutor if he had any questions. Unlike in the questioning of M.C., the prosecutor responded affirmatively, and proceeded to ask D.W."

> Very briefly. On that last question, sir, good morning. Does it—by impact, what we're looking to determine is does it cause you to be sympathetic to people at all that have problems of their own such that it might influence you, or the inverse, or it causes you to be intolerant to somebody that has committed a crime? Do you think it's a problem either way?

D.W. responded in the negative.

The prosecutor's failure similarly to ask M.C. a follow-up question indicates that his later alleged concern with her objectivity was a make-weight. Further, as it was apparent from D.W.'s responses that D.W.'s biases might lie with the defendant, the follow-up questioning of D.W. confirms once again the prosecutor was concerned with the direction of a prospective juror's bias, not with objectivity.

[6] Fourth and finally, while M.C. hesitated in her initial response to a very general question about the effect the molestation incident might have on her judgment as a juror, she later responded to a more specific question about whether the incident would have an "effect on either the defense or the prosecution in this case" with an unequivocal "no." As the district court stated, "[t]he record is replete with examples of other [unchallenged] jurors qualifying or even completely changing their answers." Juror 8, for example, vacillated on the

issue whether she could remain objective. In her final statement about the issue, Juror 8 actually stated that she would be a little biased, whereas M.C. concluded by stating unequivocally that she could judge Ali's case objectively. Given the answers of other jurors as to potential bias, M.C.'s alleged initial equivocal statements about her ability to remain objective could not have been a neutral reason for excusing her from jury service in the case.

[7] In sum, a comparison of M.C. to Jurors 6 and 8 and to potential juror D.W. demonstrates that the prosecutor favored potential jurors who, like M.C., were likely to sympathize with the victim and disfavored those, like D.W., who may have been biased toward the defendant. This comparative analysis therefore leads to only one reasonable conclusion: the prosecutor's asserted concern about objectivity was not an actual reason for his decision to strike M.C., but was pretext.

1.b. M.C.'s Involvement in the System

[8] An analysis of the record as a whole likewise invalidates the prosecutor's statement that he struck M.C. because of an alleged concern with M.C.'s involvement in the criminal justice system.

[9] Nothing in the record indicates that M.C. had had a negative experience with the criminal justice system that might bias her against the prosecution. In fact, the opposite is true: When questioned about her interactions with public officials following the attempted molestation incident, M.C. informed the court that she thought that the process that she and her daughter had gone through was "fair," and that the police had treated her and her daughter with respect.

[10] In *Kesser*, we rejected in similar circumstances the prosecutor's alleged concerns about a juror's involvement with the criminal justice system, noting that the record

> show[s] that [the struck potential juror] felt comfortable with a system that had prosecuted and incarcerated her father for the offense. When she was asked if she

> was 'satisfied with [the] conclusion' of the proceedings, she answered "Yes." On her questionnaire, she also answered that she was satisfied with the response of the police, the district attorney, and the court system.

Kesser, 465 F.3d at 364. "In fact," we observed, the struck potential juror "seems a better juror for the prosecution than others who were accepted despite minor run-ins with the law that might foster resentment. *Id.* at 365.

[11] As in *Kesser*, there were other jurors in this case who had experience with the criminal justice system but were not struck. Juror 7, for example, had actually been arrested and prosecuted (including a court appearance) for a minor crime. She described the incident as "a very negative experience," although she did note that the police had been respectful and that her bitterness over the affair was directed primarily towards an ex-roommate. Nonetheless, if "involvement with the system" was a legitimate concern of the prosecutor, he would almost certainly have struck Juror 7. Moreover, like the juror in *Kesser*, M.C. was, if anything, a better juror for the prosecution than juror 7 who was accepted despite an arrest that she described as "a very negative experience."

Juror 6 also had experience with the criminal justice system: Juror 6's husband had been arrested for assaulting her and had spent a night in jail. Although charges were never filed, Juror 6 hired an attorney in response to the arrest, and the attorney "handled" the matter with the district attorney's office and the police department. Thus, Juror 6 also had some involvement with the criminal justice system.

[12] In sum, even if severed from the objectivity rationale, the prosecutor's "involvement in the system" explanation for his strike of M.C. is not, on the record as a whole, a plausible, race-neutral justification for the strike. No court could reasonably conclude otherwise.

2. Reason 2: M.C.'s Expectation that the Attorneys Would Act Professionally

During an exchange with Ali's counsel, M.C. provided the following views on the conduct of lawyers:

> DEFENSE: Do you have any opinions about criminal defense attorneys?
>
> M.C.: No.
>
> DEFENSE: Do you think they will say or do anything to get their clients off?
>
> M.C.: Well, I haven't had that much experience in being in the company of defense attorneys or attorneys at all. I feel that they will do the right thing for their client. Their position is to go the last line for their client. I would hope that that would be done in a decent and respectable manner.
>
> DEFENSE: I understand that. Any opinions about prosecutors, they'll say or do anything to get a conviction?
>
> M.C.: My same statement goes for them as well.
>
> DEFENSE: You would hope that everybody would act professionally?
>
> M.C.: Yes.
>
> DEFENSE: Let me ask you this: If at sometime during this trial we, Mr. Buenaventura [the defense attorney's co-counsel] and I, have to sort of aggressively cross-examine some witnesses, how would you feel about that?
>
> M.C.: Well, I believe that as long as you don't cross the line of being disrespectful and still keep it in a professional matter.

> DEFENSE: You wouldn't penalize us for aggressively advocating for our client?
>
> M.C.: No.
>
> DEFENSE: Just as long as we do it in a respectful professional manner?
>
> M.C.: Yes.
>
> DEFENSE: That seems fair.

The defense later asked M.C. a series of similar questions, eliciting nearly identical answers.

M.C.'s expectations regarding the conduct of the attorneys during trial was the basis for the prosecutor's second race-neutral reason for his strike. As the prosecutor explained, "No. 2, [M.C.] was very emphatic that—about—to Mr. Morales, and then to me later, about her concerns about attorneys and the way they conducted themselves in the courtroom; that if it was anything less than professional and respectfully done that would affect her." He further clarified that his concern was that she would view "aggressive" cross-examination as unprofessional conduct and hold that against one side or the other.

The district court did not credit his explanation. It noted that "[t]he prosecutor himself gave a short speech about the level of professionalism the attorneys would maintain during the trial, thus suggesting that [M.C.'s] expectation was not unreasonable or particularly relevant to [M.C.'s] ability as a juror." It also pointed out that Juror 1 had expressed similar expectations regarding the professionalism of the attorneys, but had not been struck.

[13] We agree with the district court. As the above excerpt reveals, M.C. simply expressed reasonable expectations concerning attorney behavior. She did *not* say, as the prosecutor stated during the *Wheeler/Batson* hearing, that unprofessional conduct or aggressive cross-examination would "affect her judgment." *See Wheeler/Batson* Hearing Transcript (Prosecutor: "[T]hat it would occur [to M.C.] to say it would affect

her judgment was unreasonable"). Instead, she said the opposite—that she would *not* penalize the attorneys for aggressively advocating on behalf of their clients. The prosecutor's mischaracterization of M.C.'s testimony is evidence of discriminatory pretext. *See Miller-El*, 545 U.S. at 244.

The voir dire transcript also demonstrates that Juror 1, who the prosecutor did not strike, expressed similar expectations about the lawyers' conduct.

> DEFENSE: . . . [Do you have] any opinions about defense attorneys or prosecutors. They'll say or do anything to win?
>
> JUROR 1: No, no. Not any more than a policeman might lie.
>
> DEFENSE: I take it you say that because we sort [sic] have been talking a lot about police officers and witnesses and stuff like that?
>
> JUROR 1: Exactly, exactly. Then you said earlier that everybody should act professionally and above-board.
>
> DEFENSE: You probably agree with that statement.
>
> JUROR 1: Absolutely.

[14] Given that M.C.'s expectations were reasonable, that they were fully consistent with the prosecutor's own views about the level of professionalism that the lawyers would maintain during the trial, and that they were very similar to those of a juror who the prosecutor did not challenge, the prosecutor's "professionalism" justification, like his first explanation for his strike of M.C., is contradicted by the record. We therefore agree with the district court that the attorney professionalism explanation was not genuine and that the California courts unreasonably accepted it as non-racially motivated.

3. Reason 3: M.C.'s Reluctance to Judge

The prosecutor's third reason for striking M.C. was based on the following exchange between M.C. and Ali's counsel:

> DEFENSE: I believe in your questionnaire that you said you are a regular member of a church?
>
> M.C.: Yes.
>
> DEFENSE: Anything about your spiritual training or spiritual practice that will prevent you from judging other people if you're chosen to be a juror?
>
> M.C.: No.
>
> DEFENSE: You had to think about that for a second.
>
> M.C.: Just because the phrase "judging." Here in this position would mean something totally different than I would apply as far as my Christian faith would be interpreted. More or less this is to make a decision based on information I've gained. Judging to me means I've made a decision based on no information, just from what I see and not knowing the person or just arbitrarily. To me, that's a difference.
>
> DEFENSE: I understand that difference. We're going to do our best, and as you've heard over and over again, it's [the prosecutor's] job to present evidence, and he will do his best to present lots of evidence to you, and the defense may also present evidence to you. But at the end of the day, there still may be some questions about what exactly happened or what somebody was actually thinking.
>
> M.C.: Yes. That's true.
>
> DEFENSE: What I'm saying is you may not have exactly every fact that you need

> when you retire back to the jury deliberation room.
>
> M.C.: That's correct. But then that would be—to me that would be—I wouldn't say that's judging. That would be making a decision based on the evidence that has been presented and taking that into consideration.
>
> DEFENSE: What you're saying is that you would do your very best with the information that you have?
>
> M.C.: Yes.

At the *Wheeler/Batson* hearing, the prosecutor explained why this exchange provided him with a race-neutral reason to strike M.C.:

> No. 3, Your Honor, the question was posed to her and it was posed by the defense about what she felt in terms of sitting in judgment of others. Her response to that was a pause, reflection, and then she said, yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith . . . I thought there was hesitancy in what she said.

The district court recognized that the prosecutor misstated M.C.'s testimony about her ability to judge others, but nonetheless credited this explanation. We do not agree, for several reasons.

[15] First, we have already concluded that the prosecutor offered two (or three) pre-textual reasons for striking M.C. That the other reasons were pretextual raises an inference that this final rationale is also a make-weight. As the Supreme Court explained in *Snyder v. Louisiana*, 128 S.Ct. 1203, 1212 (2008), "the prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent," even where other, potentially valid explanations are offered. *See also*

Kesser, 465 F.3d at 360 ("[I]f a review of the record undermines the prosecutor's stated reasons, *or many of the proffered reasons*, the reasons may be deemed a pretext for racial discrimination.") (emphasis added) (internal quotation marks and citations omitted); *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989) ("[T]he fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against [the] sufficiency [of the remaining two reasons].")

[16] Second, the prosecutor once again mischaracterized M.C.'s comments, thereby providing further evidence of pretext. *See Miller-El*, 545 U.S. at 244. M.C. did not state, as the prosecutor suggested, that her Christian faith would make it difficult for her to judge Ali. She quite clearly indicated that jury service did not qualify as the type of "judging" that would conflict with her religious beliefs.

Moreover, M.C.'s statements about her Christian faith were elicited by the defense attorney. Although the prosecutor subsequently questioned M.C. at length, he did not ask a single question about her religious views or the implications of those views. This failure to inquire makes the mischaracterization of M.C.'s "Christian faith" response all the more indicative of pretext. For, as in *Miller-El*,

> "[p]erhaps [the prosecutor] misunderstood, but unless he had an ulterior reason for keeping [the juror] off the jury we think he would have . . . cleared up any misunderstanding by asking further questions. . . ." *Id.* at 244.

Third, although the district court relied on a comparison of M.C. with potential juror Marck in upholding the prosecutor's "Christian faith" rationale, that comparison in fact provides no support for the religion justification. Marck identified herself as a practicing Buddhist. When asked about her religious beliefs, Marck stated that they would not interfere with her ability to judge Ali because his case was not a capital case. Noting that

the prosecutor struck Marck, the district court concluded that the "prosecutor's concern with the effect of religious beliefs on a juror's ability to remain objective was equally applied to minority and non-minority jurors."

Marck's voir dire was different from M.C.'s, however, in two important respects. First, Marck did, in fact, indicate that her religious beliefs would affect her ability to sit as a juror under certain circumstances—i.e., in capital cases. M.C., on the other hand, clearly stated that her religious beliefs could not conflict with jury service under any circumstances because the word "judging" "mean[s] something totally different" in the context of jury service. Although Ali's murder trial was not a capital trial, the prosecutor could reasonably have had qualms about a potential juror who admitted that she could not vote in favor of the prosecution in certain circumstances for religious reasons. M.C., however, did not qualify her ability to judge a criminal case in any way.

[17] Second, Marck, like M.C., explained the effect that her Buddhist beliefs would have on her ability to judge Ali in an exchange with defense counsel. Unlike in M.C.'s case, the prosecutor asked Marck follow-up questions about her religious beliefs. thus, when the prosecutor was concerned about a juror's religious views, he specifically asked about them. His failure to do so in M.C.'s interview indicates that he did not think the issue was a significant one in her case. *See Miller-El*, 545 U.S. at 244 ("[W]e expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.") (internal quotation marks and citations omitted).

This conclusion is confirmed by the prosecutor's failure to ask follow-up questions of Juror 3, who identified himself as a Jehovah's Witness and was not struck. When asked by defense counsel how his "spiritual practice" might affect his ability to serve as a juror, Juror 3 stated, "I don't believe [it would.] I believe I can fairly and impartially consider whatever

testimony and evidence would be presented and make a judgment based on that, regardless of background and my involvement." These statements are arguably more equivocal than M.C.'s unqualified statement that she would be able to engage in the type of judging required of a juror. Yet, as in M.C.'s case, the prosecutor did not ask Juror 3 any questions about religious beliefs. This parallel further confirms that M.C.'s religious views were not a cause of concern to the prosecutor.

4. Conclusion—M.C.

[18] In sum, an analysis of the "totality of the relevant facts," including a comparison of M.C. to other potential and actual jurors, convincingly refutes each of the prosecutor's non-racial justifications for his peremptory challenge of M.C. We are therefore "compell[ed] [to conclude] that his actual and only reason for striking [M.C.] was her race." *Kesser*, 465 F.3d at 360. Moreover, "the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine." *Id.* at 358. In so doing, the California appellate court, like the district court, reached a conclusion regarding the prosecutor's intent that was not only incorrect, but unreasonable. *See Miller-El*, 545 U.S. at 266.

B. The Prosecutor's Challenge of Juror Darrell Jefferson

[19] "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 128 S.Ct. at 1208 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). As the record compels a finding that the prosecutor's removal of M.C. was racially motivated, we need not evaluate the validity of the prosecutor's peremptory challenge of Darrell Jefferson. We do so briefly, however, because the weakness of at least two of the prosecutor's justifications for challenging

Jefferson lends further support to our conclusion that M.C.'s strike was racially motivated.

The prosecutor stated that he struck Jefferson because (1) he feared that Jefferson would "over-intellectualize" the decision-making process; (2) Jefferson had provided a "smart-ass" answer to one of his questions; (3) Jefferson exhibited a casual attitude; and (4) Jefferson had discussed criminal cases with his brother, whom the prosecutor mistakenly believed to be a criminal defense attorney.

The prosecutor's first justification is highly questionable. During voir dire, Ali's attorney asked Jefferson if he would be able to keep an open mind throughout a multi-week trial and not decide the case until he deliberated with other jurors. Jefferson responded in the following way:

> JEFFERSON: Can I rephrase the statement?
>
> DEFENSE: Absolutely.
>
> JEFFERSON: I think I would be able to continuously evaluate, but the way I think people work is—I mean, you make decisions and then you change them and then you change them. That's the way as things are presented to you.
>
> DEFENSE: As you sit here today, if you're chosen to be a juror, you think that you would do that?
>
> JEFFERSON: Yes. Continuously evaluate.
>
> DEFENSE: So you may decide on Monday, looks like he is guilty, and then hear a little bit more testimony, and on Tuesday, then change my mind, well, he is not guilty, and then go back and forth in that manner.
>
> JEFFERSON: Yes, probably.

The prosecutor cited the above exchange as evidence that Jefferson would "over-intellectualize"

the decision-making process and would not keep an open mind during the trial. The State makes this argument again on appeal, noting that California's standard jury instructions inform jurors that they are not to decide an issue until the case has been submitted. *See* CALJIC No. 0.50.[7]

[20] As the trial judge pointed out, however, Jefferson's willingness constantly to re-evaluate his position is evidence of open-mindedness, not closed-mindedness. In addition, Jefferson's statements are likely an accurate assessment of the natural decision-making process and do not indicate an unwillingness to follow the law. The prosecutor's characterization of Jefferson's statements as demonstrating an unwillingness to keep an open mind is therefore dubious, and, in turn, raises doubts about the legitimacy of his first reason for striking Jefferson.[8]

[21] The prosecutor's third justification for removing Jefferson, Jefferson's alleged "casualness," is likewise weak. *See Kesser*, 465 F.3d at 364 (noting that the prosecutor's rationale for striking a potential juror, that the juror was "emotional about the

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[7] CALJIC No. 0.50 reads in relevant part: "During the course of this trial and before you begin your deliberations, you must keep an open mind on this case and upon all of the issues that you will be asked to decide. In other words, you must not form or express any opinions on this case until the matter is finally submitted to you."

[8] Ali argues that a comparative juror analysis also supports a finding that the prosecutor's "over-intellectualizing" justification is pretextual. More specifically, Ali argues that the prosecutor failed to strike a number of jurors who exhibited "intellectual proclivities," including one juror who stated that he was "trained in logical thinking." A comparative juror analysis is not useful with respect to this justification, however. The prosecutor's alleged reason for striking Jefferson was not that Jefferson was too intellectual in general, but that he would "over-intellectualize" the decisionmaking process. No other seated or potential juror discussed his or her decisionmaking processes. As a result, it is not possible to compare Jefferson to other jurors with respect to this issue.

system," was "so underdeveloped that it likely falls short of *Batson*'s mandate for a 'clear and reasonably specific' explanation of the legitimate reasons for exercising the challenges.") (alteration omitted). Although Jefferson joked with the court on a couple of occasions, his lengthy voir dire indicates that he was a thoughtful individual who would have taken the trial seriously. The trial court itself noted that "given [Mr. Jefferson's] thoughtful answers, his demeanor, his background, . . . [h]e, from this perspective, would have been an excellent juror." Moreover, the trial judge joked with a number of seated jurors during voir dire and acknowledged that he had made efforts to "keep things reasonably open and not too tense so that the jurors would be more apt to answer truthfully and expose their feelings about various matters if they felt they were comfortable." So, to the extent that Jefferson did engage in "lighthearted banter," it was with the encouragement of the trial court.

The prosecutor also failed to explain why a casual or light-hearted demeanor would render Jefferson unfit for jury service. Like the "emotional about the system" justification offered by the prosecutor in *Kesser*, the prosecutor's "casualness" rationale is "so underdeveloped that it likely falls short of *Batson* mandate for a 'clear and reasonably specific' explanation of the legitimate reasons for exercising the challenges." *Kesser*, 465 F.3d at 364 (alteration omitted); *see also id.* ("Even if the prosecutor could establish that [the struck juror] was unusually pretentious about her work, he offered no explanation about how this would render her unsuitable for the jury."). It also seems to contradict the prosecutor's alleged concern that Jefferson would "over-intellectualize" the decisionmaking process.

Although two of the prosecutor's justifications for challenging Jefferson are exceedingly weak, we acknowledge that his other two reasons for removing Jefferson find some support in the record. Jefferson twice responded to questions from the prosecutor with answers that the prosecutor credibly could have

viewed as sarcastic or hostile. Ali does not identify a single unchallenged juror who made similar remarks.

The prosecutor's concern about Jefferson's close relationship with a criminal defense attorney also appears to be credible. Jefferson asserted during his voir dire that his brother was an attorney who had represented the defendants in two criminal cases that were heard by the Supreme Court. Jefferson also acknowledged that he had discussed the cases with his brother at length. Although the relevant cases involving Jefferson's brother were, in fact, civil cases and Jefferson's brother was not a criminal defense attorney, it was reasonable for the prosecutor to rely on the information that Jefferson provided during his voir dire.

A comparative juror analysis also reveals that Jefferson's exposure to the legal system through his brother was unique among the jurors. Two unchallenged jurors had relatives who were practicing attorneys, but both of these jurors stated that they did not discuss cases with these relatives. The record therefore substantiates the prosecutor's contention that he struck Jefferson because of a concern about Jefferson's asserted connection to a criminal defense attorney.

Overall, the validity of the prosecutor's decision to challenge Jefferson is a close question. Two of the prosecutor's proffered explanations for the strike are entirely unconvincing, while the two others could be legitimate. If Jefferson had been the only African-American juror that the prosecutor struck, we might well affirm the district court's denial of Ali's petition.

[22] But Jefferson was not the only African-American the prosecutor peremptorily challenged. He also struck the only other African-American potential juror, and, in so doing, provided several pretextual explanations for that strike. In light of this additional strike, the prosecutor's proffer of two questionable explanations for his strike of Jefferson take on a significance that they might otherwise lack. *See Lewis v. Lewis*, 321 F.3d 824, 831 (9th Cir. 2003) ("The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine

the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge."). At a minimum, these dubious explanations reaffirm our conclusion that the prosecutor's actual reason for striking M.C. differed from those that he asserted and that his ulterior motive was race-based. *See Kesser*, 465 F.3d at 369 ("The prosecutor's willingness to make up nonracial reasons for striking [three minority jurors] makes it even harder to believe that this reasons for striking [a fourth juror] were race-neutral.").

IV. Conclusion

[23] Taken as a whole, the record compels a finding that the prosecutor's non-race based reasons for peremptorily striking M.C. were pretexts. The fact that the prosecutor peremptorily struck the only other African-American juror in the jury pool and provided at least two implausible reasons for that challenge reinforces this conclusion. We therefore hold that both the California Court of Appeal and the district court clearly erred when they found that Ali failed to establish purposeful discrimination. We further hold that, in light of the overwhelming evidence indicating that the prosecutor in Ali's case acted with discriminatory intent when he struck M.C., the California appellate court's finding to the contrary was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d)(2). We therefore reverse the judgment of the district court and remand with directions to issue a conditional writ of habeas corpus requiring Ali's release from custody, unless the State elects to retry Ali within a reasonable time to be determined by the district court.

REVERSED and REMANDED.

Filed August 24, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

MOHAMMED HAROON ALI,
Petitioner,

v.

RODERICK G. HICKMAN, Director
California Department of Corrections,
Respondent.

No. C 05-5243 PJH

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

(Docket No. 25)

Before the court is the petition for writ of habeas corpus filed by state prisoner, Mohammed Haroon Ali ("Ali") pursuant to 28 U.S.C. § 2254. Having reviewed the parties' papers, the record, and having carefully considered their arguments and relevant legal authorities, the court DENIES the petition.

BACKGROUND

I. Procedural History

In 2001, a jury convicted Ali of first-degree murder in the San Mateo County Superior Court. Ali had two prior felony convictions, and at the time of his murder conviction, he was on probation for aggravated kidnapping.

At a hearing on May 5, 2001, the trial court found the allegations regarding his prior offenses to be true, that one of them constituted a "strike," and that Ali had violated his probation. On August 13, 2001, the trial court sentenced Ali to an aggregate

sentence of fifty-five years to life in prison. In addition, the trial court revoked Ali's probation and reimposed the nine-year sentence from his prior aggravated kidnapping conviction.

The California Court of Appeal denied Ali's direct appeal and his petition for state habeas relief on January 30, 2004. The California Supreme Court then denied review on May 12, 2004, and denied his habeas petition on January 19, 2005. Ali filed the instant federal habeas petition on December 19, 2005.

I. Factual History

Ali's conviction arose from the following facts. A more extensive summary may be found in the state appellate court's January 30, 2004 decision. See Record Exh. 11.

Ali and the victim, Tracey Biletnikoff ("Tracey" or "Biletnikoff"), dated in late 1998 and early 1999. Both had histories of drug abuse. Ali had successfully completed a drug rehabilitation program at Project 90 in San Mateo, California, and was an adolescent counselor at Project 90 beginning in January 1999.

Two days prior to Biletnikoff's murder, Ali had relapsed and spent a night binging on alcohol and crack cocaine. On Monday, February 13, 1999, the day of the murder, Ali confessed his relapse to Tracey and others at Project 90. However, the evidence suggested that he was not under the influence of drugs or alcohol at that time.

Trial witnesses had different perspectives on the couple's relationship, but several testified that Biletnikoff was ambivalent about her relationship with Ali and intended to end it. About three weeks before her death, Biletnikoff told her stepmother she was "tired of being the caregiver" and tired of Ali's threats to go back on drugs if she left him. On the day she was killed, Biletnikoff told her best friend that she was breaking up with Ali that day. However, there was also evidence that the couple had consensual sex within 72 hours of the homicide, and Tracey and Ali were seen touching affectionately hours before her death.

As a result of his relapse, Ali faced severe consequences. He would lose his position as adolescent counselor and would need to restart the rehabilitation program in order to remain at Project 90. Additionally, he was on probation for prior offenses and was scheduled for a drug test the next day; if he failed the drug test, then his nine-year prison sentence could be reinstated. Ali, an East Indian citizen of Fiji, was also facing deportation proceedings related to his prior conviction.

At 5:00 p.m. on February 13, 1999, Biletnikoff left Ali at Project 90 to attend her own recovery meeting. Soon after, Ali went to a bus stop, where one of the Project 90 counselors found him and convinced him to attend a recovery meeting. Biletnikoff returned to Project 90 at 8:00 p.m. Witnesses testified that Biletnikoff was worried about Ali and his demands to use her car, and friends advised her not to lend him the car. Biletnikoff went to talk to Ali in his office while others attended a meeting. During Ali's subsequent confession to the police, he stated that he and Biletnikoff began to argue, which escalated into a physical confrontation. Tracey allegedly blocked Ali's exit from the office and hit him. She also called him a "loser" and compared him to her ex-boyfriend, who had relapsed and never recovered. Ali grabbed Tracey by the neck and strangled her with his hands until she fell to the ground, at which point "white stuff" came from her mouth. He then choked her with his T-shirt. Forensic evidence indicated that Biletnikoff was still alive when Ali began to strangle her with his T-shirt. Biletnikoff's body also showed other signs of violence. Her face was bruised and scraped in multiple areas around her forehead, nose, and mouth from the application of blunt force.

After killing Tracey, Ali drove one of the Project 90 vans to the back door of his office and loaded her body into the front seat. He first drove home, where he changed his clothes and talked to his nephew. Family members testified that they saw no visible signs that Ali had been in a fight. Ali confessed to his nephew that he had killed Tracey, although Ali told

him initially that he had accidentally killed her by a blow to the face with his elbow. Ali also told his nephew he did not want to go to back to jail and asked him for money. Ali then drove Tracey's body to Cañada College in Redwood City, California, where he rolled her body down a steep hillside. Ali returned to Project 90 and fled in Tracey's car to Mexico.

Ali was apprehended the following night, when he crossed the border from Mexico back into California. While in police custody, Ali confessed to killing Tracey Biletnikoff, but gave inconsistent accounts as to how he gained possession of Biletnikoff's car keys. He first asserted that he grabbed them from her during their confrontation, but then claimed that he searched her clothing for the keys after she had died.

At trial, the prosecution introduced evidence of Ali's 1994 conviction for the kidnapping of his then-girlfriend, Daisy Chandra. Chandra testified that Ali had kidnapped her, threatened to kill her, and accosted her at knife point in the past.

ISSUES

Ali raises the following claims for relief in his federal habeas petition:

> 1) that his constitutional rights were violated by the prosecutor's racially discriminatory use of peremptory challenges;
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> 2) that the trial court's manslaughter jury instruction violated his due process and fair trial rights;
>
> 3) that trial counsel was ineffective in failing to object to the trial court's manslaughter jury instruction and the prosecution's related closing argument;
>
> 4) that the introduction of propensity evidence violated his due process and fair trial rights; and

5) that the propensity evidence jury instruction given by the trial court violated his due process rights.[1]

STANDARD OF REVIEW

The petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), so the provisions of that act apply. See Lindh v. Murphy, 521 U.S. 320, 327 (1997). Under AEDPA, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the

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[1] In his petition, Ali appears to have mistakenly framed this last claim as an issue of ineffective assistance of counsel. See Petition at 24 ("The judgment of commitment rendered against the Petitioner is invalid, and his consequent detention is unlawful, because he was deprived of effective assistance of counsel guaranteed him by the Fifth, Sixth, and Fourteenth Amendments . . . because the pattern jury instructions regarding the use of propensity evidence permitted the jury to convict Petitioner of the charged crime even if the prosecution failed to prove Petitioner's guilt 'beyond a reasonable doubt.'"). However, the claim that Ali presented to the state appellate court, that the State has addressed in its opposition, and that Ali has replied to in his traverse, is actually a due process claim. See Exh. 12 at 30 (arguing in petition for review to California Supreme Court that the trial court's instruction pursuant to CALJIC 2.50.02 violated Ali's due process rights); Oppos. at 32-33; Traverse at 63. Accordingly, this court will address the claim as one based on a due process violation as opposed to a denial of effective assistance of counsel, as originally stated in Ali's habeas petition filed with this court.

facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court authority, and therefore falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite that reached by the [Supreme] Court on a question of law, or if the state court decided a case differently than the [Supreme Court] has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412 (2000). "Clearly established federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63, 75 (2003). This "clearly established" law refers to the holdings, as opposed to the dicta, of [Supreme] Court decisions as of the time of the relevant state court decision. Id.

Under the "unreasonable application" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing principle from the [Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Id. at 74. However, this standard requires the state court decision to be more than incorrect or erroneous. Id. For the federal court to grant habeas relief, the state court's application of the Supreme Court authority must be objectively unreasonable. Id. at 74. The "objectively unreasonable" standard is different from the "clear error" standard in that "the gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." Id. at 75; see Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir. 2003). Therefore, it is not enough that a habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous. Rather, the habeas court must conclude that the state court's application of federal law was objectively unreasonable. Andrade, 538 U.S. at 75; Clark, 331 F.3d at 1068.

However, when the state court decision does not articulate the rationale for its determination or does

not analyze the claim under federal constitutional law, a review of the court's application of clearly established federal law is not possible. See Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000); see also 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 32.2 at 1424-26 & nn. 7-10 (4th ed. 2001). When confronted with such a decision, a federal court must conduct an independent review of the record and the relevant federal law to determine whether the state court's decision was "contrary to, or involved an unreasonable application of" clearly established federal law. Delgado, 223 F.3d at 981.

> When a state court does not furnish a basis for its reasoning, we have no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context . . . [A]lthough we cannot undertake our review by analyzing the basis for the state court's decision, we can view it through the 'objectively reasonable' lens ground by *Williams* [*v. Taylor*, 529 U.S. 362 (2000)] . . . Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law . . . Only by that examination may we determine whether the state court's decision was objectively reasonable.

Delgado, 223 F.3d at 981.

As for state court findings of fact, under § 2254(d)(2), a federal court may not grant a habeas petition by a state prisoner unless the adjudication of a claim on the merits by a state court resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §

2254(d)(2). The "clearly erroneous" standard of unreasonableness that applies in determining the "unreasonable application" of federal law under § 2254(d)(1) also applies in determining the "unreasonable determination of the facts in light of the evidence" under § 2254(d)(2). See Torres v. Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000). To grant relief under § 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." Id. at 1108.

DISCUSSION

I. Ali's Constitutional Rights Were Not Violated by the Prosecution's Use of Peremptory Challenges

Ali claims that the prosecution exercised peremptory challenges to strike two jurors on the basis of race, in violation of Batson v. Kentucky, 476 U.S. 79 (1986).[2]

A. Legal Framework for Batson Challenges

The use of peremptory challenges by either the prosecution or defendant to exclude cognizable

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[2] In his petition, Ali initially asserts that the prosecutor's use of peremptory challenges against two African-American jurors deprived him "of a fair jury trial, due process, and the equal protection of laws guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution." However, in his briefing of the issue before this court, and in his state appellate court briefs and petition for review, he raised the issue solely as a violation of the Equal Protection Clause under Batson. Because Ali has not exhausted this claim to the extent it is based on an alleged violation of his Sixth Amendment right to a fair and impartial jury, or his Fifth and Fourteenth Amendment due process rights, nor has he briefed the issue before this court as such, this court limits its review of the issue as an alleged violation of the Equal Protection Clause under Batson.

groups from a jury may violate the Equal Protection Clause. See Georgia v. McCollum, 505 U.S. 42, 55-56 (1992). The Supreme Court first held that the Equal Protection Clause forbids the challenge of potential jurors solely on account of their race in Batson, 476 U.S. at 89.

Batson permits prompt rulings on objections to peremptory challenges under a three-step process. Id. First, the defendant must make a prima facie case that the prosecutor exercised peremptory challenges on the basis of race "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Id. at 93-94. A party establishes a prima facie case by showing that: (1) the defendant is a member of a cognizable racial group, (2) the group's members have been excluded from the jury, and (3) the circumstances of the case raise an inference that the exclusion was based on race. Id. at 96. A defendant will satisfy the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Johnson v. California, 545 U.S. 162, 170 (2005).

Second, if a prima facie case is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Batson, 476 U.S. at 97; Wade v. Terhune, 202 F.3d 1190, 1195 (9th Cir. 2000). "[T]he prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Batson, 476 U.S. at 98 n. 20. Reasons must be "related to the particular case to be tried." Id. at 98. The prosecutor's explanation need not be persuasive; unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. See Purkett v. Elem, 514 U.S. 765, 768-69 (1995).

Third and finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Batson, 476 U.S. at 98; Wade, 202 F.3d at 1195. To fulfill its duty, the court must evaluate the prosecutor's proffered reasons and credibility under the totality of

the relevant facts, using all the available tools, including its own observations and the assistance of counsel. Mitleider v. Hall, 391 F.3d 1039, 1047 (9th Cir. 2004); Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir. 2003). Comparative juror analysis, discussed in more detail below, involves determining whether non-challenged jurors possess any of the characteristics on which the prosecution challenged jurors in the protected group, and may tend to prove discrimination at the third Batson step. Miller-El v. Dretke, 545 U.S. 231, 242-43 (2005); Kesser v. Cambra, 465 F.3d 351, 360 (9th Cir. 2006); Sims v. Brown, 425 F.3d 560, 577 (9th Cir.), amended, 430 F.3d 1220 (9th Cir. 2005); United States v. You, 382 F.3d 958, 968-69 (9th Cir. 2004).

B. Factual Background

During trial, Ali's counsel made a Batson/Wheeler motion when the prosecutor used his peremptory challenges to strike the only two African-American jurors in the venire, Marcelline Combs and Darrell Jefferson. Batson, 476 U.S. at 89; see also People v. Wheeler, 22 Cal.3d 258 (1978). The trial court found a prima facie case of discrimination, and required the prosecutor to set forth his reasons for excusing the two jurors. Batson, 476 U.S. at 89.

The prosecutor first explained that he excused Combs based on her equivocal statements regarding an incident of molestation in her family. Augmentation to Reporter's Transcript ("ART") at 790, People v. Ali, San Mateo County Super. Ct. (No. SCO46199A); see also Exh. 4. Combs had indicated on her jury questionnaire that her stepson had attempted to molest her daughter. ART 250. Her stepson was subsequently arrested and taken to juvenile hall, and eventually placed on probation. ART 251-52. The prosecutor specifically took issue with Combs' response to a question regarding whether the attempted molestation would have any ramifications on the case at hand. Combs responded that she "really [didn't] think – I don't think it would have any bearing. I don't know. I don't think it would." ART 252. Additionally, the prosecutor also

expressed concern about Combs' involvement in the criminal justice system as a result of the molestation incident.[3]

Second, the prosecutor explained that he excused Combs because she had indicated that the demeanor and professionalism of the attorneys would affect her opinion of the trial. During voir dire, the prosecutor asked Combs about her impressions of attorneys and what she believed they would be willing to do for their clients. ART 398. In her response, Combs stated that she hoped the attorneys would act professionally. ART 398. She also stated that she would not penalize the attorneys if they had to engage in aggressive questioning of a witness as long as they kept it professional and respectful. ART 398.

Finally, the prosecutor asserted that Combs' Christian faith might interfere with her ability to judge Ali. Combs had indicated on her juror questionnaire that she regularly attended church. Also, during voir dire, when defense counsel inquired about the effect of her spiritual practice on the present case, Combs took a moment to think before answering that it would not affect her ability as a juror. ART 400. However, when questioned about her initial hesitancy, Combs stated there was a distinction between judging in the position of a juror and judging as a Christian, and then confirmed that her religion would not affect her ability to be objective as a juror. ART 400.

The prosecutor then offered four reasons for challenging the other juror at issue, Darrell Jefferson. First, he was concerned that Jefferson would "over-intellectualize" the case, and the prosecutor was looking for jurors who could keep an open mind until the close of the evidence. ART 792. The prosecutor based this concern on Jefferson's

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[3] Regarding his concern with Combs' experience with the criminal justice system, the prosecutor stated: "It did involve family members within the system. That was, level one, a concern I had." ART 790.

statement during voir dire that people constantly make decisions and then reassess them as new information becomes available. ART 676. Secondly, the prosecutor felt that one of Jefferson's responses had been a "smart-ass answer," which he found offensive. ART 792. This was based on an exchange he had with Jefferson in which one of Jefferson's answers drew laughter from the courtroom. Third, the prosecutor took issue with Jefferson's contact with his brother, a purported "public defender." ART 794. Jefferson stated during voir dire that his brother was a criminal appellate attorney, with whom Jefferson had discussed two criminal cases that his brother had argued before the Supreme Court.[4] ART 676. Finally, the prosecutor also mentioned that Jefferson appeared too casual, something he was not looking for in a juror, but stated that this reason alone would not be grounds for his exercise of a peremptory challenge. ART 794. These four factors together formed the basis for the prosecutor's peremptory challenge of Jefferson.

The trial court reviewed the Batson motion and found Ali had not carried his burden of proving racial discrimination. In reviewing the motion, the trial court stated that "[t]he issue is whether or not the prosecutor's justification or the defendant's justification if the issue were flipped is reasonable." ART 812. The trial court did not, however, make specific findings in denying the motion.

C. State Appellate Court Decision

In reviewing the trial court's decision on the peremptory challenge issue, the state appellate court applied the three-part Batson test. It noted that initially, the trial court had concluded that Ali had not established a prima facie case, but that the trial court had subsequently changed its ruling, found a prima facie showing of group bias, and then asked

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[4] It was unclear which Supreme Court Jefferson was referring to. His brother practices in Texas, so it was likely either the Texas or the United States Supreme Court.

the prosecutor to articulate race-neutral reasons for striking Combs and Jefferson. For purposes of Ali's appeal, the appellate court assumed that the trial court properly found that Ali established a prima facie case at step one, and noted that Ali did not dispute that the prosecutor provided facially race-neutral reasons for his peremptory challenges to Combs and Jefferson.

Turning to the third Batson step, proof of purposeful discrimination, the court of appeal then noted that it would apply a "clearly erroneous" standard of review, identical to the standard utilized by the United States Supreme Court in reviewing a state court's finding on the issue of discriminatory intent. It found no error in the trial court's determination that Ali failed to show purposeful discrimination. In support, the appellate court noted that the trial court had "closely questioned the prosecutor and weighed the proffered explanations" under the correct legal standards. The court of appeal also concluded that state law did not require the trial court to make detailed findings in denying Ali's Batson motion.

As for Combs, the state appellate court affirmed the trial court's finding of no purposeful discrimination, rejecting Ali's argument that discriminatory intent should have been inferred from the prosecution's alleged reliance on Combs' initial responses while refusing to credit later, less equivocal responses. Turning to Jefferson, the court similarly found that the record was devoid of any evidence that the prosecution possessed a racist attitude toward or distrust for African-Americans.

In affirming the trial court, the state appellate court refused Ali's request to engage in any comparative jury analysis, citing state law for the proposition that an appellate court should not engage in such analysis when it did not occur at the trial court level. See Exh. 11, at 17 n.6 (citing People v. Johnson, 30 Cal.4th 1302, 1325 (2003)).

D. Analysis

Ali's arguments on this issue are two-fold. First, he contends that the state appellate court's failure to engage in comparative juror analysis in and of itself constituted a violation of his constitutional rights under Batson. Second, he argues that comparative juror analysis reveals purposeful discrimination in violation of his Equal Protection rights.

1. Case Law re: Comparative Juror Analysis

The California Court of Appeal decided Ali's case on January 30, 2004, prior to the United States Supreme Court's June 13, 2005 decision in Miller-El. 545 U.S. at 231. In Miller-El, the defendant was charged with capital murder. At defendant's trial, the prosecution used peremptory strikes against ten out of eleven prospective African-American jurors. Id. at 233. The defendant objected that the strikes were based on race, but the Texas trial court denied relief and sentenced defendant to death after the jury convicted him of murder. While the Miller-El defendant's state court appeal was pending, the United States Supreme Court decided Batson, and the Texas appellate court remanded the case to the trial court to determine whether the defendant could show that the prosecution peremptorily struck the African-American jurors based on race under Batson. On remand, the trial court accepted the prosecution's race-neutral reasons for the strikes, and again denied relief.

A federal district court then denied the defendant's request for habeas relief, and the Fifth Circuit subsequently refused to grant a certificate of appealability ("COA"), concluding that the defendant failed to establish a viable constitutional claim. The Supreme Court reversed the Fifth Circuit's denial of a COA, finding that it was at least debatable whether a violation of petitioner's constitutional rights had occurred, and remanded the habeas petition to the Fifth Circuit for consideration on the merits. 537 U.S. 322, 348 (2003). The Fifth Circuit then denied the petition on the merits, and the Supreme Court again

granted certiorari and subsequently considered the merits. 545 U.S. at 231.

The Supreme Court ultimately concluded that the prosecution in Miller-El had engaged in racial discrimination in its exercise of peremptory challenges. The Court used comparative juror analysis for the first time on appeal to determine itself whether the prosecution had been motivated by racial bias in exercising its peremptory strikes. Id. at 239-62. It looked beyond the evidence that Miller-El had presented to the trial court and conducted a comprehensive comparative juror analysis. Id.

At the third Batson step, the Court considered the written and oral statements made by all the prospective jurors and the prosecution's stated reasons for dismissing the African-American jurors in determining whether race played a role in the prosecution's use of its peremptory strikes. Id. The Court concluded that the prosecutor asked different questions of prospective minority jurors than those it asked of prospective non-minority jurors in order to elicit varying responses, which could then justify a peremptory strike on purportedly nonracial grounds. Id. at 260. The Court also found that there was evidence that court procedure permitted the prosecution to "shuffle" juror cards to keep African-American jurors from being drawn, and the record suggested that prosecutors' handbooks used in the jurisdiction recommended racial strikes. Id. at 253-54, 263. In granting relief based on the results of the comparative juror analysis, the Court stated

> [m]ore powerful than the[] bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

Id. at 241.

Following the Court's decision in Miller-El, the state and federal courts have considered the role of comparative juror analysis on appeal. In fact, after Miller-El, the Ninth Circuit subsequently amended and withdrew a 2004 decision in which it had held that an appellate court was not required to conduct comparative juror analysis in the first instance on appeal. Boyd v. Newland, 393 F.3d 1008, 1014-15 (9th Cir. 2004), amended by 467 F.3d 1139, 1148 (9th Cir. 2006). In the amended decision, the court held that "after Miller-El, we recognize that our previous reading of Batson was too narrow and that Batson does contemplate a comparative juror analysis on appeal." Id. "The Supreme Court . . . looked beyond the evidence that Miller-El presented to the trial court and conducted a comprehensive comparative juror analysis on appeal." Id. (citing Miller-El, 545 U.S. at 241).

The Boyd court noted that "Miller-El made clear that comparative juror analysis is an important tool that courts should utilize in assessing Batson claims." Id. (quoting Miller-El, 545 U.S. at 240). It rejected the government's argument that any requirement for comparative juror analysis, as established by Miller-El, was barred by Teague v. Lane, 489 U.S. 288 (1989), since Miller-El was decided after the Boyd petitioner's conviction became final. Id. The Ninth Circuit reasoned that Miller-El did not create a new rule of criminal procedure, but simply clarified Batson. Id. at 1146. It further noted that in Miller-El, the Supreme Court applied its holding to Miller-El himself, whose conviction obviously became final prior to the Court's decision. Id. The Boyd court thus held that "if the Supreme Court's endorsement of comparative juror analysis on appeal constituted a new procedural rule, the Court would not have applied that rule to Miller-El, whose case came before the Court on an appeal from a denial of habeas corpus." Id.

The Boyd court nevertheless qualified its holding, adding that "we do not hold that comparative juror analysis always is compelled at the appellate level . . . but comparative juror analysis is

an important tool that courts should use on appeal." Id. at 1148-49 (further stating that "[l]ike the California courts to address the issue, we do not hold that comparative juror analysis is always compelled at the appellate level").

However, in its subsequent decision in Kesser, the Ninth Circuit went farther than it did in Boyd regarding the necessity of comparative juror analysis. 465 F.3d at 351. The defendant/petitioner in Kesser was convicted of first degree murder. During voir dire, the prosecutor struck three Native American women and one Asian woman. Id. at 353. At the defendant's request, the trial court conducted an evidentiary hearing, and required the prosecutor to explain the reasoning behind his strikes. Id. The prosecutor explained that he struck one of the potential Native American jurors because she worked for a tribe and he feared she was "inclined to favor Native American culture and institutions over 'the mainstream system,'" and that "Native Americans were 'resistive' and 'suspicious' of the criminal justice system." Id. at 353-54. He rated that juror a "C" overall, finding her to be "pretentious," "self-important," "somewhat unstable, fairly weak, and some[one] who . . . would be easily swayed by the defense." Id.

Following the prosecutor's explanations, defense counsel expressed particular concern with the above stricken juror, arguing that it represented "classic example of . . . a presumption of a group bias based on a stereotype membership in a racial group . . . ." Id. at 355. The trial court, however, found sufficient justification to support all of the peremptory challenges and held that the juror was dismissed because she worked for a tribe, not because she was a member of the tribe. Id.

The Kesser defendant appealed to the state courts, arguing that the prosecutor struck potential jurors on the basis of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment. The state appellate courts affirmed the trial court, and on federal habeas review, this court denied Kesser relief, concluding that "although the

trial court 'commit[ed] serious error in failing to recognize the bias inherent in one of the prosecutor's purportedly neutral reasons,' the court of appeal acted appropriately in finding that 'race was not the primary reason given by the prosecutor.'" Kesser v. Cambra, 2001 WL 1352607 (N.D. Cal. 2001).

A divided Ninth Circuit panel originally affirmed this decision, but then the court granted a rehearing en banc and reversed. Kesser, 392 F.3d 327 (9th Cir. 2004), reversed by 465 F.3d at 351; 425 F.3d 1230 (9th Cir. 2005) (granting rehearing). The en banc court held that the California Court of Appeal failed "to consider comparative evidence in the record before it [which] undeniably contradicted the prosecutor's purported motivations, [and] unreasonably accepted his nonracial motives as genuine." 465 F.3d at 357.[5] The court reasoned that Batson requires analysis of "'the totality of relevant facts' about a prosecutor's conduct," and it concluded that the "totality of relevant facts" includes the characteristics of the people the prosecutor did not challenge. Id. at 360. The court asserted that "[i]f a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [non-minority] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Id. at 361 (quoting Miller-El, 545 U.S. at 241). The Kesser court ultimately concluded that the California courts' findings were not only wrong, but that the courts had engaged in an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. at 358 (quoting 28 U.S.C. 2254(d)(2)).

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[5] The Kesser court noted that the California appellate court probably did not engage in comparative juror analysis itself because at the time of the state court's decision, California law did not require comparative juror analysis on appeal. The court, however, suggested that "[t]he California courts may wish to revisit this position in light of Miller-El." 465 F.3d at 360 n. 3.

> The [Supreme] Court in Miller-El applied comparative juror analysis to a case originally tried in 1986, remanded for a Batson hearing in 1988, and appealed under AEDPA in 2000. The Court's holding means that the principles expounded in Miller-El were clearly established Supreme Court law for AEDPA purposes at least by the time of the last reasoned state court decision in Miller-El, handed down in 1992, before Kesser's 1993 trial.

Id. at 360.

The Kesser majority refuted the dissent's argument that it should not engage in comparative juror analysis because the "factual basis" for such analysis had not been presented to the state appellate courts. Id. at 361. The court concluded that "the 'factual basis' for comparative juror analysis is contained in the voir dire, which was submitted to the California Court of Appeal and was part of the evidence presented in the State Court proceeding." Id. It further noted that the Supreme Court reached a similar conclusion in Miller-El, holding that "[t]here can be no question that the transcript of voir dire, recording the evidence on which Miller-El bases his arguments and on which [the Court] base[s] [its] result, was before the state courts." Id. (quoting Miller-El, 545 U.S. at 241 n.2) (asserting that the Miller-El dissent "conflate[d] the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence").

Noting that like the Miller-El Court, it, too, had the voir dire transcripts and juror questionnaires before it, the Kesser court then concluded that comparative juror analysis revealed that the prosecutor's justifications clearly demonstrated racial bias, which was more than sufficient to justify granting the writ on the basis of the comparative juror analysis alone. Id. at 361, 368.

Accordingly, after Kesser, at least in the Ninth Circuit, the requirement that appellate courts engage

in comparative juror analysis, even if such an analysis did not occur at the trial court level, has been determined to be clearly-established Supreme Court law under Miller-El. However, Kesser did not explicitly state that a state appellate court's failure to engage in such analysis is in and of itself an unreasonable application of clearly-established Supreme Court law for purpose of federal habeas review. Nor has the Ninth Circuit articulated which appellate court, on federal habeas review, should perform the comparative juror analysis.[6]

The state courts have similarly struggled with the issue. Prior to the Supreme Court's decision in Miller-El, the California Supreme Court, in the case relied on by the California Court of Appeal in this very case, disapproved of conducting comparative juror analysis for the first time on appeal. See Johnson, 47 Cal.3d at 1220-21. Following Miller-El, unlike the Ninth Circuit, the California Supreme Court has not held that the Supreme Court's decision in Miller-El *requires* comparative jury analysis in the first instance on appeal; instead, the state courts, including the California Supreme Court, have, for the most part, simply gone ahead and, assuming without deciding the issue, conducted such analysis. See People v. Zambrano, 2007 WL 2164057 at *14 (Cal. July 30, 2007); People v. Stevens, 41 Cal.4th 182, 196 (Cal. 2007). The California Supreme Court, however, granted review in a case that will resolve the issue for the state appellate courts. See People v. Lenix, California Supreme Court No. S148029.

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[6] The Ninth Circuit has implicitly addressed these issues in at least two unpublished decisions issued after its decision in Kesser. Review of the unpublished decisions suggests that where the state court fails to engage in comparative juror analysis at the third Batson step, the Ninth Circuit will simply conduct its own comparative juror analysis, and that if the results of the analysis do not indicate purposeful discrimination, then any failure by the state court to engage in such analysis will be considered harmless.

2. State Appellate Court's Failure to Engage in Comparative Juror Analysis

Here, the state appellate court failed to engage in comparative juror analysis at the time of Ali's appeal because California Supreme Court caselaw discouraged such analysis for the first time on appeal. However, the legal landscape shifted with the United States Supreme Court's decision in Miller-El, and with the Ninth Circuit's decisions in Boyd and Kesser interpreting Miller-El. In fact, as noted in Kesser, the Ninth Circuit concluded that the comparative juror analysis requirement was clearly-established federal law as of 1992, prior to when Ali's conviction became final. Because this court is bound by Ninth Circuit decisions, it must assume for purposes of this federal habeas petition that the state appellate court's failure to conduct a comparative juror analysis at step three of its Batson analysis was contrary to clearly established federal law.

However, that in and of itself does not entitle Ali to relief on this claim. The United States Supreme Court recently confirmed that "when a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law," this court "must then resolve the claim without the deference that AEDPA otherwise requires." Panetti v. Quarterman, 127 S.Ct. 2842, 2858 (June 28, 2007). Accordingly, this court is not required to grant relief, but instead reviews de novo whether or not Ali has established purposeful discrimination at step three of the Batson test. See id.; see also McCollum v. Papa, 2007 WL 2316345 at *1 (9th Cir. Aug. 14, 2007) (same).[7]

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[7] The court notes that Ali also contends that the state appellate court's decision affirming the trial court was unreasonable because the trial court applied the wrong legal standard in evaluating the prosecution's proffered justifications at step three of the Batson test. However, because this court will review step three de novo, and will apply clearly-established Supreme Court law in evaluating the prosecution's

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It is apparent to this court that the Ninth Circuit's interpretation of Miller-El mandates comparative juror analysis in this case. It is still unclear to the court, though, at which level the comparative juror analysis should take place. For example, should this court grant the writ and remand the case to the state appellate court(s) for purposes of conducting the analysis? Or should the court simply undertake its own comparative juror analysis?

As a practical matter, it appears that the effect of the Ninth Circuit's decision in Kesser will be to require federal district courts, on habeas review, to conduct such analysis in the first instance when the state appellate court decisions occurred prior to Miller-El. As noted, the state appellate courts have only begun engaging in such analysis recently because state law previously discouraged analysis for the first time on appeal. Thus, in many currently pending federal habeas cases, there will have been no such analysis, and it will be incumbent upon either the district court or the Ninth Circuit on appeal to conduct the requisite analysis required by Kesser, assuming that the Ninth Circuit does not instruct district courts to remand the cases to state court for this purpose. In spite of the uncertainty, the court elects to conduct its own comparative juror analysis, and has comprehensively reviewed the juror questionnaires and voir dire transcript, in addition to other portions of the record before it.

3. Comparative Juror Analysis for This Case

As noted, the prosecutor's first reason for striking Combs was based on his concern with her equivocal answers about whether the molestation of her daughter would affect her ability to serve as an objective juror. Although Combs' initial response was somewhat hesitant, her later responses to the prosecutor's questioning about law enforcement's

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reasons, this issue is moot.

handling of the case were positive and unequivocal. ART 252. Combs felt her daughter had been treated with respect by law enforcement. ART 252. Nothing in her answers indicated that Combs might be biased against law enforcement. While the State is correct that the prosecutor is entitled to credit an initial hesitant response despite a juror's later, more affirmative responses, this rationale is not convincing given the unchallenged jurors' responses in this case. See Rice v. Collins, 546 U.S. 333, 342 (2006). The record is replete with examples of other jurors qualifying or even completely changing their answers. ART 92, 164-165, 323, 450, 452, 632, 714, 780, 847. [8] Therefore, comparative juror analysis undermines this particular explanation for the prosecution's challenge to Combs.

However, as part of his first justification, the prosecutor also expressed concern with Combs' involvement in the criminal justice system as a result of the molestation incident. Ali contends that other seated jurors also had incidents of domestic violence, which were more directly tied to the case at hand and also indicated bias. ART 243, 262, 369, 431. However, the prosecutor was more concerned about a potential juror's involvement in the criminal justice system generally rather than with specific incidents of domestic violence. For example, the prosecutor excused another juror, David Whitney, who also had an incident of molestation in his family. ART 66-67. Both Combs and Whitney, had significant experience in their pasts with the criminal justice system as a result of the molestation incidents. This experience with the criminal justice system clearly differentiated Combs (and Whitney) from similarly-situated jurors who were permitted to serve. Neither

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[8] For example, when asked about his ability to listen carefully to the evidence, Trial Juror No. 9 stated: "I would certainly try my best to do that." ART 165. Also, Trial Juror No. 3 responded to a question regarding the effect of Ali's substance abuse on her judgment of the case by stating: "I don't think it would affect my judgment." ART 323.

juror to whom Ali refers, Trial Juror No. 6 nor Trial Juror No. 8, actually filed charges or went through the legal process. [9] Therefore, the prosecutor's concern with a potential juror's, including Combs', involvement in the system was legitimate and consistently applied without apparent discriminatory purpose.

As noted, the prosecutor's second reason for Combs' excusal concerned her attitudes regarding the attorneys' professionalism and conduct in the courtroom. Contrary to the prosecutor's statement in connection with the Batson motion, Combs never stated that the level of professionalism would "affect" her. Additionally, the record demonstrates Trial Juror No. 1 had similar expectations of professionalism and was seated without challenge. ART 431-32. The prosecutor himself gave a short speech about the level of professionalism the attorneys would maintain during the trial, thus suggesting that this expectation was not unreasonable or particularly relevant to Combs' ability as a juror. ART 201. Thus, comparative juror analysis fails to support the prosecutor's justification on this point as well.

The prosecutor's final justification was that Combs' Christian faith would interfere with her ability to judge Ali. Initially, it is worth noting that the prosecutor misstated Combs' response. He restated her answer as affirmatively stating that she would have a problem with judging. ART 791. However, Combs never explicitly indicated that her religion would affect her ability as a juror, but rather pointed out the distinction between the types of judging as evidence that her roles as a juror and as a Christian would not conflict. Furthermore, contrary

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[9] Trial Juror No. 8 responded to a question regarding her friend, a victim of domestic violence, with "I cannot say that would not be part of my opinion in my thought process." ART 430. Defense counsel then asked ". . .[F]rom what I'm hearing, there may be a bit of bias if you sat as a juror on this case, is that correct?", to which she replied, "That's correct." ART 431.

to the prosecutor's statement, it was not through defense counsel's questioning that Combs drew this distinction, but rather through her own personal reflection. ART 400.

Nevertheless, as compared to other similarly-situated unchallenged jurors, Combs' reflections on her religion's impact on her judgment as a juror did indicate some hesitancy on her part. Ali points to another juror questioned on his religion, Alternate Juror No. 3, as expressing similar views to Combs on the issue of judgment and religion. However, this juror did not raise any questions about judgment; rather, he simply responded that he didn't believe his religion would interfere. Furthermore, the court notes that the prosecutor exercised a peremptory challenge on another juror, Ms. Marck, who, like Combs, stated that her Buddhist religion would not affect her abilities to judge Ali. ART 308. Thus, the prosecutor's concern with the effect of religious beliefs on a juror's ability to remain objective was equally applied to minority and non-minority jurors, and does not demonstrate racial discrimination. ". . . [C]ounsel is entitled to exercise his full professional judgment in pursuing his client's legitimate interest in using peremptory challenges. . ." Burks v. Borg, 27 F.3d 1424, 1429 (9th Cir. 1994) (quoting J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)).

On balance, comparative juror analysis calls into question two of the prosecutor's proffered justifications, including Combs' alleged equivocal statements about the incident of molestation in her family and her concern with the professionalism of the attorneys. However, the other two justifications, Combs' involvement in the criminal justice system and the impact of religion on her judgment, were equally applied to other unchallenged nonminority jurors, and therefore support a finding that the prosecutor's use of a peremptory strike as to Combs was race-neutral.

Turning to the other juror at issue, as noted, the prosecutor's first justification for striking Darrell Jefferson was his concern that Jefferson would "over-intellectualize" the case. Ali points to several seated

jurors who also displayed "intellectual proclivities" during the course of voir dire. However, the prosecutor's concern with Jefferson is more appropriately characterized as involving Jefferson's ability to withhold judgment until the close of the evidence than his intellectualism.[10]

Though a juror's professed decisionmaking process is a subjective factor, it "may play a legitimate role in the exercise of challenges." Id. at 1429. While Jefferson's response during voir dire regarding the decisionmaking process and assessment of information was a very thoughtful and realistic reflection on human nature, it also suggested that he may not wait until all the evidence had been submitted before rendering a judgment. ART 700. Maintaining an open mind was a point the prosecution emphasized consistently throughout the course of voir dire with multiple prospective jurors.[11] Also, the prosecution exercised a peremptory challenge on a Caucasian juror, David Whitney, whom the trial judge similarly characterized as "independent minded." ART 812. Thus, comparative juror analysis demonstrates this justification was racially neutral.

The prosecution's second justification involved Jefferson's "smart-ass" response to one of the prosecutor's questions. This can be analyzed together with his comment that Jefferson was too casual, as

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[10] The prosecutor remarked as follows regarding Jefferson's potential to "overintellectualize": "I want jurors, what I think Mr. Morales [Ali's defense counsel] was striving for with him, about keeping an open mind until the end and not making decisions." ART 793.

[11] Some examples include the prosecutor's questioning of Trial Juror No. 4 about being "open-minded" about psychiatric testimony (ART 222); his statement that "[w]e're exploring to find out if anybody has opinions that could keep them from fairly listening to the evidence. . ." (ART 290); and his statement to Mr. Moura, another potential juror, that the judge will instruct them: "Don't arrive at a quick decision, keep an open mind." ART 319.

both reflect on Jefferson's demeanor and attitude, a legitimate basis for exercising a peremptory strike. Id. As Ali points out, the phrasing of the prosecutor's question could have indicated that he had felt Jefferson had indicated bias during the course of voir dire. Although Jefferson may have been justified in asserting that he would not be biased, it was credible that the prosecutor interpreted his response as offensive or "smart-ass." "[P]eremptories are often the subject of instinct," and it is possible that this exchange led the prosecutor to believe Jefferson was biased against him by joking at his expense. Miller-El, 545 U.S. at 252. Ali fails to point to another juror, seated without challenge, who could be compared to Jefferson in this respect, except to contend that defense counsel also drew some laughter from the jury at his expense.

Finally, the prosecutor cited Jefferson's relationship with his brother, a "public defender," as a cause for concern. Ali notes that Trial Juror No. 2, who was seated without challenge from the prosecution, had an uncle in Georgia who was also a public defender. However, Jefferson demonstrated more familiarity with his brother's work and claimed to have discussed two criminal defense cases with him. ART 676. In comparison, Trial Juror No. 2 indicated that she had never talked to her uncle about the cases he was involved in and talked to him rarely in general. ART 661. Thus, there is a wide disparity between Jefferson and Juror No. 2 in terms of their interaction with and knowledge of the criminal justice system.

Ali also makes much of the fact that Jefferson's brother is not actually involved in criminal defense but rather does civil appellate work. However, Jefferson represented during questioning that the cases he had discussed with his brother had been criminal cases before the Supreme Court. Accurate or not, this is the information that was available to the prosecutor at the time of the Batson/Wheeler motion. The prosecutor did represent that he had some outside knowledge of Jefferson's brother as a criminal defense attorney due to the publicity

surrounding his appointment to the Texas Supreme Court, which ultimately turned out to be incorrect. However, the record supports the prosecutor's belief that Jefferson had experience with criminal defense through his brother.

4. Conclusion

Having reviewed the record de novo and having conducted a comparative juror analysis, the court finds that the evidence of racial discrimination pales in comparison to that in Miller-El and Kesser. In Miller-El, the evidence of discrimination was bolstered by instances of jury shuffling and disparate questioning between minority and non-minority jurors, in addition to the concerns raised by the comparative juror analysis in that case. Miller-El, 545 U.S. at 231. There, the prosecution used peremptory strikes against 10 of 11 prospective African-American jurors. Id. at 233. Comparative juror analysis revealed that the prosecution's justifications were not applied equally to non-minority jurors. Id. The prosecution also shuffled the jury twice, moving African-American jurors to the back of the jury pool. Finally, the prosecutor posed different questions to African-American jurors, using more graphic terms before asking their opinion on the death penalty. Id.

Similarly, in Kesser, some of the prosecutor's justifications themselves were barely facially neutral as they were tinged with racial stereotyping against Native Americans and closely tied to race. Kesser, 465 F.3d at 351. When proffering his justifications, the prosecutor used blatant racial and cultural stereotypes. Id. at 357. He identified the challenged jurors by their skin color and stated that he challenged them due to his experience with Native Americans as resistant to mainstream culture and suspicious of the criminal justice system. Id. The prosecutor was also concerned that the prospective jurors may be tolerant of child molestation because of their association with the Native American tribe. Id. When analyzed by comparative juror analysis, the prosecutor's justifications clearly demonstrated racial bias, which was more than sufficient to justify

granting the writ on the basis of the comparative juror analysis alone. Id.

In contrast, no such evidence is present in this case. While the instant comparative juror analysis does reveal some minor faults in the prosecutor's reasoning, the court finds that these faults do not demonstrate racial bias or pretext. The court further finds that the prosecution's race-neutral justifications were sufficiently credible, clear, and reasonably specific. It therefore concludes that based on the totality of relevant facts, Ali has not shown purposeful discrimination at step three of the Batson test.

For these reasons, the court denies habeas relief for this claim.

II. The Special Manslaughter Jury Instructions Did Not Violate Ali's Constitutional Rights

Ali also asserts that his due process rights were violated by the special manslaughter instruction given at his trial, claiming it precluded the jury from convicting him of voluntary manslaughter and reduced the burden of proof required of the State.

At trial, the judge gave the standard instruction defining provocation, CALJIC 8.42, [12] and

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[12] CALJIC 8.42 provides:

> The heat of passion that will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts and circumstances that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time. The question to be

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additionally, instructed the jury pursuant to a special instruction proffered by the prosecutor which emphasized that provocation should be judged by an objective standard.

The special instruction, as read to the jury, provided:

> The ordinarily reasonable person of average disposition is measured by an objective standard. Evidence of the defendant's personal characteristics is not relevant as to the determination of the conduct of an ordinarily reasonable person of average disposition.

Reporter's Transcript ("RT") at 3456, People v. Ali, San Mateo County Super. Ct. (No. SCO46199A); see also Exh. 3.

During his closing argument, the prosecutor made the following statements with respect to the special instruction:

> There has to be a heat of passion at the time of the crime that would be aroused in the mind of the ordinarily reasonable person in the same circumstances. The facts of the case must be such that they would provoke the ordinarily reasonable person to attack the victim and inflict fatal injury on the victim. That's what the average ordinarily reasonable person would do. Not the defendant.

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> answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than judgment . . .

CALJIC 8.42; see also Exh. 2 at 48.

RT 3307.

The prosecutor continued to explain that the law did not allow Ali to set up his own standard to excuse or justify the attack. "To go down to this level of manslaughter. . . [the standard is whether] the average, ordinary reasonable person would engage in this conduct when facing those circumstances." RT 3308. The prosecutor also emphasized that the provocation must come from the victim, and cannot be in response to the provocation of third parties. RT 3308.

Additionally, during his closing argument, the prosecutor asserted that the provocation may occur over either a short or long time. He stated that "it must involve an emotion that causes the killer to act from impulse or rashness rather than choice," and that slight provocation is insufficient to reduce the crime to manslaughter. RT 3308.

Further, the prosecutor emphasized that the standard was objective. "It is not the average person who used drugs. [Ali's] personal characteristics. . . [such as being] somebody quick to anger, anything like that, [is] not a factor." RT 3309.

Finally, the prosecutor concluded:

> Because the average, reasonable person, even hearing what [Ali] said was the case, even hearing what he said that she called him some names, that Tracey called him some names and slapped him or punched him, the average, reasonable person is going to strangle? I don't think that's a standard any jury would want to set, and I know you won't do so either. This case is premeditation. This case is deliberation.

RT 3309.

Ali argues that his due process rights were violated by the special instruction because the jury could have interpreted it to mean that in order to find him guilty of manslaughter rather than murder, it would first have to find that the provocation would have induced the same violent act by an ordinarily reasonable person of average disposition. Ali also

challenges the related portions of the prosecutor's closing argument, which he argues misled the jury and prevented it from reaching a verdict of voluntary manslaughter.

On appeal, the California Court of Appeal concluded that the special instruction comported with California law, and thus there was no instructional error. Although the court did not explicitly state that it found the instruction ambiguous, nevertheless it analyzed the instruction under the standard applicable to the analysis of ambiguous instructions. The state appellate court found that the special instruction merely restated a well-settled standard for judging provocation, and was not in error. It held that "[i]t is undisputed that an objective, reasonable person standard applies in judging the adequacy of provocation, and that a defendant's personal characteristics, including intoxication, mental deficiencies, and psychological dysfunctions due to traumatic experiences, are irrelevant to that determination." The appellate court also found that the instruction's reference to "conduct" did not improperly "shift focus" to Ali's actions, but rather restated a principal of law contained in the standard jury instruction, CALJIC 8.42, that a defendant may not set up his own standard of conduct. Thus, it concluded that there was no reasonable likelihood that the jury misunderstood the special instruction.

Additionally, the appellate court found that Ali had waived his right to object to the prosecutor's closing argument due to his failure to object at trial, and that a general attack on the summation was not cognizable on appeal. However, it reviewed portions of the closing argument which were relevant to the jury's potential misunderstanding of the instruction and found that the prosecutor spent little time characterizing the special instruction, and was not inaccurate in doing so. It determined that the prosecutor correctly stressed the objective standard applicable to the law of provocation.

A challenge to a jury instruction solely as an error under state law does not state a claim

cognizable in federal habeas corpus proceedings. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). Nor does the fact that a jury instruction was inadequate by Ninth Circuit direct appeal standards mean that a petitioner who relies on such an inadequacy will be entitled to habeas corpus relief from a state court conviction. See Duckett v. Godinez, 67 F.3d 734, 744 (9th Cir. 1995) (citing Estelle, 502 U.S. at 71-72), cert. denied, 517 U.S. 1158 (1996).

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. Estelle, 502 U.S. at 72; Cupp v. Naughten, 414 U.S. 141, 147 (1973); see also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) ("[I]t must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned,' but that it violated some [constitutional right]."). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Estelle, 502 U.S. at 72. In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. United States v. Frady, 456 U.S. 152, 169 (1982).

In reviewing an ambiguous instruction, the inquiry is not how reasonable jurors could or would have understood the instruction as a whole; rather, the court must inquire whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. Estelle, 502 U.S. at 72 & n.4; Boyde v. California, 494 U.S. 370, 380 (1990); see Ficklin v. Hatcher, 177 F.3d 1147, 1150-51 (9th Cir. 1999) (harmless error when certain that jury did not rely on constitutionally infirm instruction). A determination that there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution establishes only that an error has occurred. See Calderon v. Coleman, 525 U.S. 141, 146 (1998). If an error is found, the court also must

determine whether the error had a substantial and injurious effect or influence in determining the jury's verdict, see Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), before granting relief in a habeas proceedings. See Calderon, 525 U.S. at 146-47; see, e.g., Sarausad v. Porter, 479 F.3d 671, 679 (9th Cir. 2007) (finding reasonable likelihood that jury applied ambiguous instruction on accomplice liability to find petitioner guilty of murder in a way that relieved the State of its burden of proof, and that this error was not harmless).

However, if the disputed instruction is erroneous on its face, the "reasonable likelihood" standard employed for ambiguous jury instructions is not required. Ho v. Carey, 332 F.3d 587, 592 (9th Cir. 2003). For example, if a jury instruction omits a necessary element of the crime, constitutional error has occurred. Id.; see also id. at 593 (finding jury instructions "erroneous" rather than ambiguous, where they included an uncorrected erroneous instruction that second-degree murder could be based on a finding of general intent, but also included an accurate description of the elements of second-degree murder, including specific intent). Actual prejudice is still required before relief may be granted, however. See id. at 595 (citing Brecht, 507 U.S. at 637).

As noted, the California Court of Appeal never explicitly stated whether it considered the instruction to be ambiguous or erroneous. However, since it analyzed the instruction under the "reasonable likelihood standard," see Estelle, 502 U.S. at 72 & n.4, it presumably interpreted the instruction as ambiguous rather than erroneous. Nevertheless, Ali contends that the special instruction was indeed facially erroneous because the reasonable man does not kill, and a standard which requires a reasonable person to act homicidally under the given circumstances is an impossible standard to attain.

His arguments are not persuasive, though, given Ninth Circuit law to the contrary. An example of an erroneous instruction is one which omits a necessary element of the law. Wade v. Calderon, 29 F.3d 1312, 1321 (9th Cir. 1994), overruled on other

grounds, Rohan ex. rel Gates v. Woodford, 334 F.3d 803, 815 (9th Cir. 2003). The special instruction in this case did not omit any element of the homicide charge, and also did not contain any explicit misstatement of the law. Sarausad, 479 F.3d at 690 (concluding that the lack of an explicit misstatement of law in the contested jury instruction rendered it ambiguous rather than erroneous). Furthermore, contrary to Ali's arguments otherwise, the term "conduct" as utilized by the special instruction is ambiguous at best. It could refer to the petitioner's aroused passions in reaction to the particular circumstances, or it could refer to his actions as a result of those passions. Given these dual interpretations, the state appellate court's treatment of the instruction as ambiguous rather than erroneous was not unreasonable.[13]

The California Court of Appeal's conclusion that no instructional error occurred was not unreasonable. As noted, the trial court instructed the jury pursuant to CALJIC 8.42, which states that a defendant may not set up his own standard of conduct and justify or excuse his actions because of personal characteristics. Additionally, the jury was instructed to consider the instructions as a whole and in light of all the others pursuant to CALJIC 1.01. When read

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[13] It is unclear under Ninth Circuit law whether the characterization of a jury instruction as ambiguous constitutes a mixed question of law and fact, or otherwise. Wade, 29 F.3d at 1320 (concluding that the contested instruction was erroneous rather than ambiguous without stating under which section of AEDPA it analyzed the lower court's conclusion); Ho v. Carey, 332 F.3d at 595 (determining that a state appellate court's analysis of an instruction as ambiguous rather than erroneous was incorrect and conducted a de novo analysis without stating the standard for overturning the state court's determination). Given the uncertainty, this court considered this issue in light of the habeas standards applicable to both, and without deciding the standard of review issue, concludes that under any standard – the least deferential and the most deferential standard, Ali is not entitled to relief on this claim.

alongside and in light of CALJIC 8.42, the special instruction merely reemphasized that Ali's personal characteristics were not relevant. The special instruction did not improperly focus the jury's attention on the homicide, but instead emphasized that it was required to consider whether Ali's level of arousal constituted that of an ordinary, reasonable person under the circumstances. Thus, any potential juror confusion regarding the standard of provocation, resulting from the special instruction, would have been resolved by the other instructions provided to the jury.

Additionally, as noted, the appellate court reviewed only the portions of the prosecutor's summation that were relevant to the special instruction, and determined they were not erroneous. The appellate court's decision in this regard was also reasonable. Even if certain portions of the prosecutor's statement relating to the special instruction may have been potentially misleading, they comprised only a small part of the closing argument, and also correctly stated the law in large part. Further, "[a]rguments of counsel generally carry less weight with a jury than do instructions from the court . . . [T]hey are not to be judged as having the same force as an instruction from the court. And arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." Boyde, 494 U.S. at 384. Additionally, the trial judge's instruction to the jury that "if anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow those instructions," reduced the likelihood that the jury blindly followed the law as described by the prosecutor in the closing argument. RT 348.

Moreover, the jury's request for additional copies of jury instructions also suggests that it adequately reviewed the instructions for itself. RT 3490. Given the jury instructions as a whole, the trial court's utilization of the special instruction, in combination with the challenged portions of the

prosecutor's closing argument, did not create a reasonable likelihood that the jury applied the special instruction in a manner that violated Ali's due process rights. Accordingly, the California Court of Appeal's decision was not an objectively unreasonable application of Supreme Court law; nor was it based on an unreasonable determination of the facts. For these reasons, Ali's claim fails.

III. Ali Was Not Denied Effective Assistance of Counsel

On a related note, Ali also contends that his counsel's failure to object to the special instruction and related portions of the prosecutor's closing argument deprived him of effective assistance of counsel as guaranteed by the Sixth Amendment.

Ali asserts that his trial counsel was ineffective in failing to object specifically to the portion of the prosecutor's closing statement in which the prosecutor analogized the deliberation required to establish first-degree murder to "changing lanes on the freeway." The prosecutor used the analogy in an attempt to demonstrate that Ali had deliberated and was not acting in the heat of passion when he killed Biletnikoff. Ali contends that this analogy improperly conflated the definitions of intent and deliberation, which prejudiced the outcome of the trial by reducing the State's burden of proof on the first-degree murder charge.

In his closing argument, the prosecutor defined deliberation as the "careful thought and weighing of considerations for and against the act." ART 3301. He emphasized that the duration of time spent deliberating is not as important as the extent of the reflection. ART 3301. The prosecutor analogized deliberation to driving home on the freeway during rush hour while attempting to switch lanes. He compared a defendant's lack of deliberation to a driver "changing lanes" without looking or thinking about the act. ART 3301. Then, he continued to explain that deliberation is similar to evaluating whether or not to change lanes:

> [Y]ou do what most of us would do, which is, first thing you do is look in your rearview mirror. Any cars coming that way? And then you look in your side mirror, and then you do a quick look over your left shoulder, something that might take three or four seconds at most to do. But you reflect on it. If there is a car coming, you go? No, you can't do it. If there is no car coming, you say okay, I'm safe. That just couple of seconds of reflection. That would mean what we call deliberate. That is a deliberate act. That's why the law tells you time is not the key factor. Premeditation and deliberation.

RT 3301-3302.

Ali raised the ineffective assistance of counsel claim in his petition for writ of habeas corpus before the California Court of Appeal, which issued a "postcard denial," denying review without comment. The California Supreme Court also denied review without comment. Where the state court issues a "postcard denial," this court construes the denial as one on the merits and sufficient for exhaustion purposes. See Greene v. Lambert, 288 F.3d 1081, 1086-87 (9th Cir. 2002). Therefore, this court must conduct an independent review of the record and the relevant federal law to determine whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law." Delgado, 223 F.3d at 982.

In order to prevail on a Sixth Amendment ineffective assistance of counsel claim, a petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." Id. at 694.

To show that counsel's performance was deficient, a petitioner must demonstrate that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. See id. at 687. The petitioner must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. See id. at 688. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. See Strickland, 466 U.S. at 689.

Second, the petitioner must show that counsel's errors were so serious as to deprive the petitioner of a fair trial, a trial whose result is reliable. Id. at 688. The test for prejudice is not outcome-determinative, i.e., petitioner need not show that the deficient conduct more likely than not altered the outcome of the case; however, a simple showing that the defense was impaired is also not sufficient. Id. at 693. The petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

Where the petitioner is challenging his conviction, the appropriate question is "'whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" Id. at 695; see, e.g., Plascencia v. Alameida, 467 F.3d 1190, 1201 (9th Cir. 2006) (ineffective assistance of counsel claim not established because "any prejudicial effect was at best minute" from counsel's failure to object to evidence about existence of a drug in murder

defendant's system where only killer's identity was in dispute); Pirtle v. Morgan, 313 F.3d 1160, 1170-71 (9th Cir. 2002) (finding prejudice where counsel failed to request a diminished capacity instruction, which left the jury with no legal context to evaluate expert testimony about effect of chronic drug abuse on petitioner's ability to premeditate).

A. Deficient Performance

Ali asserts that counsel's failure to object to the special instruction and the prosecutor's related closing argument was not a tactical decision within the range of reasonable trial decisions. As proof, Ali submits a declaration from his defense counsel in which his counsel attests that in hindsight, he did not realize the grave effect of the special instruction and related closing argument on the case, as he had never defended a case with a viable voluntary manslaughter defense. Additionally, Ali provides a declaration from an experienced criminal defense attorney, Philip Barnett, who claims that the San Mateo County District Attorney's office has a history of characterizing the definition of provocation in the manner employed by the prosecution in Ali's case, which Barnett attests he typically rebuts during his closing statement.

However, this evidence fails to demonstrate that Ali's counsel was deficient. The state appellate court concluded that the special instruction was a correct statement of California law. There is no reason to believe that the trial court would have sustained the objection had defense counsel objected to the instruction on due process grounds. The appellate court also found that the prosecutor's characterization of the special instruction in his closing argument was not erroneous, thus also suggesting that any objection would not have been sustained. Counsel's failure to make a fruitless objection is not ineffective assistance of counsel. Rupe v. Wood, 93 F.3d 1434, 1444-45 (9th Cir. 1996).

Additionally, the issue is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable.

See Babbitt, 151 F.3d at 1173. Counsel's decision not to object to the special instruction or the closing argument was not unreasonable, even if in retrospect he might have done things differently. The benefit of hindsight does not establish that Ali's counsel's choices fell outside a range of reasonable conduct. Strickland, 466 U.S. at 689. Accordingly, Ali fails to demonstrate that his attorney's performance was deficient.

B. Prejudice

Having concluded that Ali has not demonstrated deficient performance, the court is not required to address the prejudice prong. Id. at 697. Nevertheless, the court concludes that Ali cannot demonstrate that there is a reasonable likelihood that counsel's failure to object altered the outcome of his trial.

Ali contends that his counsel's failure to object prejudiced him by preventing the jury from convicting him of a lesser crime than first-degree murder. However, even assuming that counsel's failure to object to the prosecutor's special instruction and closing argument was deficient, Ali is unable to show that he was prejudiced as a result.

As previously discussed, use of the special manslaughter jury instruction in combination with the related portions of the prosecutor's closing argument did not violate Ali's due process rights. The jurors had the correct definitions of the various levels of homicide as provided by the jury instructions, which they clearly spent time reviewing as suggested by their request for additional copies. The trial court also gave an instruction, CALJIC 8.50, distinguishing murder from manslaughter, which reminded the jury that it was the State's burden to prove that the victim's death was not the result of heat of passion. It gave an instruction, CALJIC 8.72, advising the jury not to convict Ali of murder if there was doubt whether the killing was murder or manslaughter. Additionally, the jury was instructed pursuant to CALJIC 8.73, which provides that

evidence of provocation could have a bearing on the existence of premeditation and deliberation.

Further, the first-degree murder verdict did not hinge solely on a determination that provocation was inadequate to negate malice aforethought. The jury also needed to find that Ali acted willfully, deliberately and with premeditation pursuant to CALJIC 8.20, or killed during the commission of a robbery pursuant to CALJIC 8.21, none of which were affected or addressed by the special instruction. See, e.g., People v. Thomas, 25 Cal. 2d 880, 899 (Cal. 1945). Because it is well-settled that "juries are presumed to follow their instructions," Zafiro v. United States, 506 U.S. 534 (1993), even if defense counsel had objected to the instruction and had been successful in his objections, it is not reasonably likely that the result would have been different.

Turning to the prosecutor's use of the "changing lanes" metaphor, even if defense counsel had successfully objected to the prosecutor's metaphor, it is not reasonably likely the result would have different. Contrary to Ali's interpretation, the metaphor did not conflate intent to kill with the elements of premeditation and deliberation. At best, the metaphor may have oversimplified the definition of deliberation while emphasizing that no particular amount of time is required to establish premeditation and deliberation, which constituted a correct statement of California law. See Thomas, 25 Cal.2d at 900 ("The true test is not the duration of time as much as it is the extent of the reflection.").

Again, the jurors were informed that any conflict between statements by counsel and the instructions should be resolved in favor of the instructions. RT 348. The instructions correctly defined the elements of first-degree murder, including premeditation and deliberation. CALJIC 8.20 clearly indicated that intent to kill is not equivalent to premeditation and deliberation when committed under the heat of passion, and is not a sufficient basis for a verdict of first-degree murder. The record demonstrates that the jury reviewed the instructions again during deliberations, thus

suggesting it did not rely blindly on statements made during closing arguments. The instructions were clear that the jury should not convict Ali of first-degree murder if it had doubts about whether the murder was first degree or second degree. See, e.g., CALJIC 8.71.

For these reasons, habeas relief on Ali's claim for ineffective assistance of counsel is denied as well.

IV. The Introduction of Propensity Evidence Against Ali Did Not Violate His Due Process Rights

Ali also claims that the introduction of propensity evidence violated his due process and fair jury trial rights. The trial court allowed the prosecution to call Daisy Chandra ("Chandra"), Ali's ex-girlfriend, and an investigating police officer to testify about Ali's prior aggravated kidnapping offense. During her testimony, Chandra described two incidents of kidnapping by Ali, including his physical violence and threats to kill her. She testified that his violence was in response to her ending her relationship with Ali. The trial court admitted the evidence to show intent, as part of the prosecution's theory that Ali reacted violently to rejection from women.

Ali argues that there was no rational basis for admitting propensity evidence in a case such as this one, which he asserts involves domestic violence, because consent was not a defense. Therefore, Ali claims that he was prejudiced by the introduction of evidence of his prior domestic violence offenses. Nevertheless, Ali concedes that the Ninth Circuit recently held in Alberni v. McDaniel that a state appellate decision concluding that the admission of propensity evidence does not violate due process was not objectively unreasonable. 458 F.3d 860, 866 (9th Cir. 2006).

The California Court of Appeal concluded that the propensity evidence regarding Ali's previous misconduct was properly admitted under California

Evidence Code sections 1101 and 1109, and did not violate his due process rights.[14] Further, it found that the trial court did not abuse its discretion under California Evidence Code section 352, which permits the trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. In holding that the trial court did not abuse its discretion, the appellate court determined that the trial court's ruling on the prejudice issue reflected careful and sound balancing of the probative value of the evidence.

Additionally, the appellate court concluded that the Chandra evidence was relevant to Ali's premeditation and deliberation, as well as to his intent. It found that the Chandra evidence was highly probative given other evidence suggesting that Biletnikoff intended to end her relationship with Ali, and may have done so shortly before her death. It reasoned that if Ali responded violently to rejection by women, the Chandra evidence was relevant in determining whether his violent response to Biletnikoff was deliberate, as well as to Ali's intent.

The appellate court's decision was reasonable given Ninth Circuit authority on this issue. In Alberni, the defendant/petitioner was charged with murdering his friend. 458 F.3d at 862. At his trial, the prosecution submitted evidence of the petitioner's past violent actions and explosive temper to challenge the defense's theory that the shooting was accidental. Id. at 863. The petitioner argued that the admission of the propensity evidence violated his due

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[14] California Evidence Code § 1101 permits the admission of evidence of prior criminality to prove some fact (i.e. motive, intent, etc.) other than disposition to commit such an act. California Evidence Code § 1109(a) permits the admission of prior acts of domestic violence so long as they are permitted by California Evidence Code § 352.

process rights. Id. The Ninth Circuit held to the contrary. Id. at 866.

Given the Ninth Circuit's recent decision in Alberni, the court concludes that the California Court of Appeal's decision upholding admission of the Chandra evidence was reasonable. Habeas relief on this claim is denied.

V. The Propensity Evidence Instruction Did Not Unlawfully Lessen the Prosecution's Burden of Proof

Ali contends that the 1999 version of CALJIC No. 2.50.02, the instruction regarding propensity evidence, as given by the trial court, violated his due process rights by permitting the jury to find him guilty by a preponderance of the evidence, as opposed to beyond a reasonable doubt. The relevant portion of that instruction provides:

> Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in the case.
>
> . . . .
>
> If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. In addition, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character. It may also be considered by you for the purpose of determining if it tends to show the existence of intent which is a necessary element of the crime charged or a motive for the commission of the crime charged.

> However, if you find by a preponderance of evidence that the defendant committed a prior offense involving domestic violence, it is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offense. The weight and significance, if any, are for you to decide.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

The jury was also instructed pursuant to CALJIC 2.50.2, the instruction defining preponderance of evidence, which states:

> "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find the evidence on any side of an issue preponderates, your finding on that issue must be against the party who has the burden of bringing it. You should consider all the evidence bearing on any issue regardless of who produced it.

The California Court of Appeal denied Ali's claim based on the California Supreme Court's decision in People v. Reliford, 29 Cal. 4th 1007, 1012-16 (Cal. 2003). In Reliford, the California Supreme Court held that the 1999 version of CALJIC 2.50.01, an analogous instruction, did not create a reasonable likelihood that the jury would apply the preponderance of evidence standard instead of the reasonable doubt standard, and therefore the instruction was constitutional.[15] Id. at 1016.

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[15] The language in the contested instruction in the case at hand, CALJIC 2.50.02, and the contested instruction in (continued...)

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). Faulty jury instructions justify habeas relief only if the instructions by themselves so infect the entire trial that the resulting conviction violates due process. Estelle, 502 U.S. at 72. The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Id. The instructions must be more than erroneous; Ali must show a reasonable likelihood that in light of the instructions as a whole, the jury applied the challenged instructions in a way which violated his due process rights. Id.

Ali contends that the 1999 version of CALJIC 2.50.02, as provided at trial, violated his due process rights because the court did not sufficiently instruct the jury that the lower standard of proof used to establish prior domestic violence offenses did not apply to its determination regarding murder, a verdict that must be reached beyond a reasonable doubt. However, Ali recognizes that this court has previously reviewed an analogous instruction, and followed the line of analysis utilized by the California Supreme Court, in concluding that the disputed instruction did not violate a petitioner's due process rights. See Kagel v. Scribner, 2004 WL 1777381 (N.D. Cal., August 6, 2004).

Like the petitioner in Kagel, Ali has similarly failed to show that the state appellate court's determination regarding the jury instructions here was unreasonable. The jury instructions as a whole

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(...continued)
Reliford, CALJIC 2.50.01 is nearly identical. Reliford, 29 Cal. 4th at 1011-12. The only significant difference is that the instruction in Reliford instructed the jury on propensity evidence for prior sex crimes, whereas the contested instruction in the present case deals with domestic violence propensity evidence. Id.

mitigated any possible misinterpretation of the contested instruction. The trial court instructed the jury pursuant to CALJIC 1.01 to consider the instructions as a whole. The trial court also gave CALJIC 2.09, instructing the jury that certain evidence was only to be considered for a limited purpose. The jury was also instructed that Ali must be presumed innocent unless proven guilty beyond a reasonable doubt pursuant to CALJIC 2.90, and the trial court defined reasonable doubt in accordance with CALJIC 2.90.

Moreover, the disputed instruction itself, CALJIC 2.50.02, specifically states that a finding that Ali had committed the previous offenses is not sufficient to prove beyond a reasonable doubt that he committed the charged offense. Finally, the jury was instructed on the elements required to convict of the charged offense, and that proof of each element was required. In light of the accompanying instructions, there was not a reasonable likelihood that the jury applied CALJIC 2.50.02 in such a way that Ali's due process rights were violated. See Estelle, 502 U.S. at 72. Accordingly, the California Court of Appeal's decision was not unreasonable, nor was it an unreasonable application of clearly established Supreme Court precedent. For this reasons, this claim fails as well.

VI. Conditional Request for Evidentiary Hearing

In his petition, Ali asserted a "conditional" request for an evidentiary hearing in the event that this court concludes that his petition should be denied. The State opposes this request in its opposition, arguing that Ali has not shown diligence entitling him to a hearing or that the hearing would be useful to resolution of any of his federal habeas claims. Ali failed to respond to the issue in his traverse.

AEDPA's section 2254(e)(2), governing evidentiary hearings, provides:

> If the applicant has failed to develop the factual basis of a claim in state court

> proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that:
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The United States Supreme Court has interpreted the opening paragraph of the section to provide that where a petitioner has indeed exercised diligence to "develop the factual bases" of his claims in state court, the requirements of section 2254(e)(2)(A)& (B) do not apply to his request for an evidentiary hearing. Williams v. Taylor, 529 U.S. 420, 435 (2000); Holland v. Jackson, 542 U.S. 649, 652-53 (2004). In other words, a petitioner who has exercised such diligence will be taken out of the purview of section 2254(e)(2), or as the Ninth Circuit has sometimes termed it, subjected to the evidentiary standard in "pre-AEDPA" cases. Griffey v. Williams, 345 F.3d 1058 (9th Cir. 2003), vacated on other grounds as moot, 349 F.3d 1157 (9th Cir.2003) (petitioner died); Williams, 529 U.S. at 430 (showing under 2254(e)(2) "applies only to prisoners who have 'failed to develop the factual basis of a claim in state court proceedings'").

Accordingly, "[a] petitioner who avoids the reach of § 2254(e)(2) qualifies for an evidentiary hearing if the petitioner alleges facts, that if proven, would entitle him to relief and the state court trier of fact

has not, after a full and fair hearing, reliably found the relevant facts." Griffey, 345 F.3d at 1065 (citing Jones v. Wood, 114 F.3d 1002, 1010, 1013 (9th Cir. 1997)). "In other words, petitioner must allege a colorable constitutional claim." Turner v. Calderon, 281 F.3d 851, 890 (9th Cir. 2002). There is no "per se rule requiring an evidentiary hearing whenever a petitioner has made out a colorable claim, though." Id. "Rather, a petitioner must establish that his allegation. . ., if proven, would establish a constitutional deprivation." Id. "Entitlement to an evidentiary hearing based on alleged ineffective assistance, for example, requires a showing that if [petitioner's] allegations were proven at the evidentiary hearing, deficient performance and prejudice would be established." Id. Where a petitioner is unable to make the showing of diligence required, he will be subjected to the more stringent standards contained in section 2254(e)(2)(A) & (B). Williams, 529 U.S. at 435; Holland, 542 U.S. at 652.

The court has reviewed the record, and confirmed that Ali did not request an evidentiary hearing in either his appellate briefs on direct appeal or in his habeas petitions in the state appellate courts. Diligence "depends upon whether petitioner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005) (quoting Williams, 529 U.S. at 435). "Diligence requires in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Williams, 529 U.S. at 435. The Ninth Circuit has held that where a petitioner brought his claims only on direct review before the state appellate court, failed to request an evidentiary hearing there, and failed to file a state habeas petition as to those claims, that he "failed to develop the factual basis of his claim in state court proceedings." Bragg v. Galaza, 242 F.3d 1082, 1090 (9th Cir. 2001). "[Petitioner's] inactions show[ed] insufficient diligence to satisfy the standard set forth in Williams." Id. Because Ali cannot be said

to have exercised diligence in developing the factual bases of these claims in state court, his request must be subjected to the more stringent standards of § 2254(e)(2).

Turning to that section, Ali has not even articulated, much less demonstrated, that "new" evidence exists that could not have been previously discovered or raised in the state court proceedings through the exercise of due diligence. See § 2254(e)(2)(A)(I). Permitting an evidentiary hearing on issues which could have been raised in the state court proceedings, but were not, would only serve to provide "an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." Williams, 529 U.S. at 437. Nor is there a new rule of constitutional law which is made retroactive on collateral review in this case. See § 2254(e)(2)(A)(ii).

Alternatively, even if Ali had requested an evidentiary hearing before the state courts, thus exercising diligence in fully developing his claims, it is not clear to the court "what more an evidentiary hearing might reveal of material import." See Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002) (denying petitioner's request for evidentiary hearing regarding his assertion of actual innocence). Because Ali's claims may be resolved by reference to the state court record and the documentary evidence he has submitted, the court denies his conditional request for an evidentiary hearing. See Griffey, 345 F.3d at 1067 (even where petitioner had shown diligence entitling him to evidentiary hearing, Ninth Circuit concluded that petitioner was not entitled to evidentiary hearing because his claims could be resolved by reference to the state court record and the documentary evidence he submitted); see also Campbell v. Wood, 18 F.3d 662, 679 (9th Cir. 1994).

CONCLUSION

For the reasons set forth above, Ali's petition for a writ of habeas corpus is DENIED.
The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 24, 2007

/s/

PHYLLIS J. HAMILTON
United States District Judge

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,

v.

MOHAMMED HAROON ALI,
Defendant and Appellant.

A096034

(San Mateo County Superior Ct. No. SCO46199A)

Appellant Mohammed Haroon Ali killed his girlfriend by strangling her, first with his hands and then with a twisted T-shirt wrapped around her neck. Appellant's defense at trial was that he was guilty of no more than second degree murder or voluntary manslaughter because he killed without premeditation, and in a heat of passion upon the victim's provocation. The jury rejected the defense and convicted appellant of first degree murder. (Pen. Code, §§ 187. subd. (a), 189.) Appellant is serving a prison sentence of 25 years to life, doubled as a strike and then enhanced an additional 5 years due to a prior serious felony conviction. (Pen. Code, §§ 187, subd. (a), 189, 190, subd. (a), 667, subd. (a)(1), 1170.12, subd. (c)(1).)

Appellant claims on appeal that the jury was improperly instructed, that the prosecutor excluded

prospective jurors on the basis of race, and that evidence of appellant's violent crime against a former girlfriend was wrongly admitted.[1] We reject the claims and affirm the judgment.

FACTS

Appellant and Tracey Biletnikoff dated in late 1998 and early 1999. Appellant was 23 years old and had a history of drug abuse. Appellant had recently graduated from a rehabilitation program at Project 90, a San Mateo residential alcohol and drug recovery facility. Appellant started work as an adolescent counselor at Project 90 in January 1999, and shared an office at Project 90' s Friendship Hall, a facility for meetings and social events. Biletnikoff was 20 years old and also recovering from drug addiction.

Trial witnesses had different perspectives on the couple's relationship, but several testified that Biletnikoff was ambivalent about her relationship with appellant and intended to end it. About three weeks before she was killed, Biletnikoff told her stepmother that she was "tired of being the caregiver" and tired of appellant threatening to go back on drugs if Biletnikoff left him. On Monday, February 15, 1999, the day she was killed, Biletnikoff told her best friend that she was breaking up with appellant that day.

Meanwhile, appellant had relapsed over the weekend. On Saturday night and Sunday morning, February 13 and 14, appellant smoked crack cocaine and drank beer while "bar hopping" in San Francisco, then partying in a motel room with two friends from Project 90. Appellant also used heroin for the first time.

On Monday, February 15, appellant and Biletnikoff arrived at a Project 90 facility around 4:30 or 5:30 p.m., and appellant confessed to program

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[1] Appellant also petitions for a writ of habeas corpus. We deny that petition today by separate order.

managers that he had relapsed two days prior. Appellant was not under the influence of drugs or alcohol on Monday, but was upset about his relapse over the weekend because he would lose his job at Project 90 and would have to start over again in the rehabilitation program. Also, appellant was on probation and scheduled for a drug test the next day, February 16. Appellant worried that he would be found in violation of probation and sent to prison for a nine-year term. Appellant, an East Indian citizen of Fiji, was also facing deportation proceedings from his prior conviction. People at Project 90 consoled appellant and assured him that he could return to the program, and Biletnikoff was supportive of appellant and comforted him.

Biletnjkoff left to attend an afternoon recovery meeting, and a Project 90 manager agreed that he would look after appellant. Appellant was angry with Biletnikoff because she refused to let him use her car to go to San Francisco, where she believed he wanted to go to "get high." A Project 90 counselor found appellant at the bus stop and convinced him to attend a recovery meeting at Friendship Hall. Appellant attended the meeting from 5:00 to 6:00 p.m., but never made any promise to rejoin the rehabilitation program. An unwillingness to return to the program would create difficulties in his relationship with Biletnikoff, as Project 90 managers testified that a recovering substance abuser cannot stay in a relationship with someone who refuses treatment without jeopardizing her own recovery.

Appellant remained at Friendship Hall, and was in his office playing a computer card game about 7:45 p.m., when people started to gather at the building for an 8:00 p.m. meeting. Biletnikoff completed her afternoon meeting at the Women's Recovery Center and arrived at Friendship Hall for the 8:00 p.m. meeting. Biletnikoff continued to worry about appellant and his demands to use her car, and friends told Biletnikoff that she should not lend her car.

Appellant's program mentor arrived at Friendship Hall and spoke to Biletnikoff, who was

sad, and who angrily told him that appellant had relapsed and was "being an ass." Appellant's mentor spoke to appellant and told him he had to start over on his rehabilitation. The mentor also asked appellant, "[w]hy are you taking it out on Tracey [Biletnikoff]? Why are you being hard on her when you're the one that made the mistake?" Appellant cried and said he would like to talk to her. The mentor went to speak to Biletnikoff, and told her appellant was in the back office. Biletnikoff went to talk to appellant while others went to the meeting. Biletnikoff was seen in the early stage of her encounter with appellant, talking quietly to him from his office doorway.

Appellant killed Biletnikoff during this encounter by strangling her, first with his hands and then with a twisted T-shirt. A forensic pathologist testified that a person being strangled may lose consciousness in a few seconds, but that death by strangulation takes from three to five minutes. The pathologist discredited defense counsel's suggestion that Biletnikoff may have died in seconds from pressure upon her neck's carotid sinus.

Biletnikoff did not die quickly: her neck showed extensive bruising and internal bleeding from manual strangulation, and her face was suffused with blood from the force of the T-shirt tied tightly around her neck. Appellant strangled Biletnikoff with his hands for some period of time, rupturing blood vessels and causing hemorrhaging of her neck muscles and organs. He then went over to the desk in his office, took his T-shirt from the desk, stood over her prostrate body, twisted and tightly wrapped the T-shirt around her neck, and knotted it. Forensic evidence established that Biletnikoff was still alive when appellant strangled her with the T-shirt. Appellant never removed the T-shirt he used as a ligature. When the pathologist examined Biletnikoff's body two days after her death, the ligature around her neck was still so tight that the pathologist could not pass even the thin tip of tweezers between the ligature and the victim's neck. Biletnikoff's body showed other signs of violence. Her face was bruised

and scraped in multiple areas around her forehead, nose, and mouth from the application of blunt force.

After strangling Biletnikoff to death, appellant put Biletnikoff's body into a Project 90 van. Appellant drove home, arriving there around 9:00 p.m. Appellant was living with his sister and brother-in-law, Khuseed and Mohammed Khan, in San Mateo. Appellant's family saw no signs that appellant had been in a fight; his face showed no cuts, bruises, red marks, or any other kind of injury. Appellant changed his clothes and went to talk to his 18-year-old nephew, Mohammed Atish Atik Sharif. Appellant and Sharif went outside, and appellant said that there was an "accident" and Biletnikoff died when he unintentionally struck Biletnikoff's face with his hand or elbow. Sharif asked appellant where Biletnikofff was, and appellant said "right here" and pointed toward a parked van. Appellant told Sharif that he did not want to go back to jail, and asked Sharif for money. Appellant and Sharif arranged to meet around 11:00 p.m., and appellant left in the van.

Appellant dumped Biletnikoff's body down a hillside at Canada College. Appellant then met his nephew as planned, and Sharif followed in his car as appellant drove the van back to Project 90's Friendship Hall. Appellant did not have authority to drive the Project 90 van; Project 90 vans are restricted to program assignments and must be signed out. Appellant left the van and the two men drove in Sharif's car to a bank automated teller machine where Sharif withdrew money to give appellant. Sharif drove appellant back to Friendship Hall where appellant took Biletnikoff's car, entering the car with a key.

Sharif had convinced appellant to talk to his sisters, and appellant and Sharif drove separately to the sisters' San Leandro home, arriving around midnight. Appellant told his sisters and a brother-in-law that he had an "accident" with Biletnikoff, and hit her with his elbow while fighting with Biletnikoff to get a key from her. Appellant's sister telephoned the Khan residence and appellant told his brother-in-

law Mohammed Khan, that he accidentally hit Biletnikoff in the face with his elbow and that she was dead. Khan asked where the body was and appellant said he threw Biletnikoff over a cliff but did not know where. Khan told appellant to turn himself over to the police and to help them locate Biletnikoff, in the hope that she may still be alive. Appellant did not reply. The Khans asked one of the San Leandro sisters to bring appellant home, and Khan telephoned the police and reported the killing. Meanwhile, as the San Leandro household was preparing to take appellant home, appellant left.

Appellant fled to Mexico in Biletnikoff's car. Biletnikoff's body was discovered at Canada College the next morning, February 16, 1999. Appellant was apprehended shortly after 8:00 p.m. that night, crossing the border from Mexico back into California. Appellant told a customs inspector that he had visited Mexico to go "partying" with friends. When interrogated by San Mateo police officers, appellant initially denied killing Biletnikoff.

Appellant eventually confessed. Appellant said that he and Biletnikoff argued about his relapse. Biletnikoff wanted appellant to rejoin the rehabilitation program and he did not want to start over. Appellant asked Biletnikoff for a ride or the key to her car, and Biletnikoff refused, saying that she wanted appellant to stay and talk about reentering the program. Appellant grabbed the keys from Biletnikoff and, according to appellant, she hit him in the face and chest.[2] Appellant also told the police that Biletnikoff stood blocking the doorway, saying, "'I'm not gonna let you go, asshole . . ..,'" and comparing him to her ex-boyfriend who relapsed and never recovered. Appellant claimed Biletnikoff called him other names as they continued to argue. Appellant was angry and grabbed Biletnikoff's neck

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[2] Appellant gave inconsistent accounts of how he gained possession of Biletnikoff's car keys, as he also told the police that he searched Biletnikoff's clothes for the keys after she was dead.

with both hands. Appellant said that Biletnikoff hit him in the face as he continued choking her. Appellant released her and she fell to the ground as "white stuff" came from her mouth. Appellant went to his desk, took his T-shirt from the desk, and tied it tightly around her neck. Appellant told the police that he thought Biletnikoff was dead before he tied the T-shirt because of the "white stuff" from her mouth. When asked why he would tie the T-shirt if she was already dead, appellant said "I don't know" and then told the police "I was still mad at her." At trial, the pathologist testified that white froth is generated by people struggling to breathe, and that appellant's description of "white stuff" coming from Biletnikoff's mouth meant she was then still alive.

At trial, there was also evidence introduced of appellant's 1994 conviction for kidnapping his then girlfriend, Daisy Chandra. Chandra testified that appellant attacked and abducted her when she tried to end her relationship with him. In November 1994, appellant pulled Chandra from a friend's car, dragged her to his car, punched her repeatedly, threatened to kill her, and held her against her will for two nights. Appellant released her only after she said she would reconcile with him. As soon as she was released, she reported her abduction to the police. In December 1994, appellant broke into Chandra's home, accosted her with a knife, and forced her from the house and into his car. Appellant said he was going to kill her and drove to a secluded spot. Appellant punched Chandra and held her in the car until she again promised to reconcile with him. Appellant released Chandra, who reported her abduction to the police and testified against him in court. Appellant pled no contest to kidnapping and was placed on probation on a suspended nine-year prison sentence.

DISCUSSION

A. The jury was not misinstructed on voluntary manslaughter

Appellant's principal claim on appeal is that the jury was improperly instructed on voluntary manslaughter. The trial court gave several standard jury instructions, which appellant does not challenge, and also a special instruction that was proposed by the prosecutor and is the focus of appellant's objection on appeal. Under the standard jury instructions, the jury was advised that a killing is voluntary manslaughter, and not murder, when the killing occurs upon a sudden quarrel or heat of passion that amounts to adequate provocation. (CALJIC No. 8.50.)

The court continued with standard instructions in defining provocation: "What is meant by sudden quarrel or heat of passion [in] the area of provocation? To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the [passion], and the assailant must act under the influence of that sudden quarrel or heat of passion. . . . [¶] The heat of passion that will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. [¶] A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts and circumstances that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [¶] Legally adequate provocation may occur in a short or over a considerable period of time. The question to be answered is whether or not at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from passion rather than from judgment. Notice it's an objective standard." (See CALJIC No. 8.42.)

The prosecutor also requested a special instruction emphasizing that provocation is judged objectively, and not upon personal characteristics of the defendant. Defense counsel objected that the jury should be permitted to consider appellant's personal characteristics, particularly his history of substance abuse and possible intoxication. The court overruled the objection and administered the special instruction, as follows: "The ordinarily reasonable person of average disposition is measured by an objective standard. Evidence of the defendant's personal characteristics is not relevant as to the determination of the conduct of an ordinarily reasonable person of average disposition."

Appellant does not renew his trial court objection to the special instruction, but presents a different challenge to it.[3] Appellant argues that the instruction erroneously "contains a crucial shift of focus" from whether the passion of the ordinarily reasonable person would have been aroused, to whether an ordinarily reasonable person would have engaged in the conduct at issue.

Appellant also maintains that the prosecutor further encouraged this mistaken shift of focus in his closing argument to the jury. The prosecutor told the jury, without defense objection: "There has to be a heat of passion at the time of the crime that would be aroused in the mind of the ordinarily reasonable person in the same circumstances. The facts of the case must be such that they would provoke the ordinarily reasonable person to attack the victim and inflict that fatal injury on the victim. That's what the average, ordinarily reasonable person would do. Not the defendant. [¶] He doesn't get to set up his own standard to excuse or justify the attack. To go down to this level of manslaughter would have to be that the average, ordinary, reasonable person would

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[3] The People argue that appellant cannot claim instructional error on grounds not presented below. We address the merits of the claim without resolving the waiver argument.

do that, would engage in this conduct when facing those circumstances."

No instructional error occurred so as to prejudice appellant's right to a fair trial. The special instruction states: "Evidence of the defendant's personal characteristics is not relevant as to the determination of the conduct of an ordinarily reasonable person of average disposition." It is undisputed that an objective, reasonable person standard applies in judging the adequacy of provocation, and that a defendant's personal characteristics, including intoxication, mental deficiencies, and psychological dysfunctions due to traumatic experiences, are irrelevant to that determination. (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

There was no mistaken "shift of focus," in the use of the term "conduct." The special instruction's reference to an ordinarily reasonable person's "conduct" simply amplifies a principal of law stated in the standard jury instructions: "A defendant is not permitted to set up his own standard of conduct .... " (CALJIC No. 8.42.) Provocation must be sufficient to make an ordinarily reasonable person act rashly, not just sufficient to make defendant, with his personal characteristics of substance abuse, act rashly. There is no reasonable likelihood that the jury misunderstood the special instruction.

As for the prosecutor's argument to the jury, appellant failed to object at trial and thus waived any claims of prosecutorial misconduct on appeal. (*People v. Frye* (1998) 18 Cal.4th 894, 969-970.) Appellant acknowledges the waiver but maintains that the prosecutor's argument is relevant to assessing the likelihood of the jury misunderstanding the challenged instruction. However, the prosecutor's argument spent little time characterizing the law expressed in the special instruction, and was not erroneous in its characterization. The prosecutor properly stressed the objective standard applicable to the law of provocation: "There has to be a heat of passion at the time of the crime that would be aroused in the mind of the ordinarily reasonable

person in the same circumstances." The prosecutor also correctly stated that appellant "doesn't get to setup his own standard to excuse or justify the attack." Appellant's dispute with other elements of the prosecutor's argument are not focused upon the subject matter of the special instruction. The issue cognizable on appeal is appellant' s complaint about the special instruction, under which we may consider the prosecutor's jury summation relating to it. Not cognizable on appeal is a general attack on the prosecutor's summation unrelated to the special instruction. Those claims were waived by appellant's failure to object at trial.

B. The jury selection process was not marred by purposeful discrimination.

Appellant contends that the prosecutor excluded prospective jurors on the basis of race. Jury selection was conducted over a period of four days, and numerous peremptory challenges were exercised on both sides. The prosecutor exercised 15 peremptory challenges during jury selection, 2 against African-Americans. No African-Americans were on the jury as finally constituted.

Each party is entitled to peremptory challenges during jury selection but may not exercise those challenges on the basis of race. (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97 (*Batson*); *People v. Wheeler* (1978) 22 Ca1.3d 258, 276 (*Wheeler*); Code Civ. Proc., § 231.) Federal and California standards for evaluating the constitutionality of a prosecutor's use of peremptory challenges are similar. (*People v. Reynoso* (2003) 31 Cal.4th 903, 915.) A three-part process is used at trial for evaluating whether a prosecutor has wrongly excluded potential jurors on the basis of race. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Citation.] Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror .in question. [Citation.] Third, in light of the parties' submissions, the .trial court must determine whether the defendant has shown

purposeful discrimination." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329, citing *Batson, supra*, 476 U.S. at pp. 96-98.) "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.)

The African-American prospective jurors challenged by the prosecutor were M.C., a female public school employee, and D. J., a male software designer.[4] The trial court initially found no prima facie showing of group bias upon the prosecutor's peremptory challenge to M.C. However, when D. J. was challenged late in the jury selection process, the court found a prima facie showing of group bias and asked the prosecutor to explain his decision to remove both M.C. and D. J.

The prosecutor provided three reasons for excluding M.C. from the jury. First, M.C.'s stepson was prosecuted for molesting her daughter and, when first questioned whether the incident might influence her as a juror, M.C. said "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would." The prosecutor said that M.C.'s initial uncertainty in answering the question and her contact with the criminal justice system concerned him. Second, in the course of questions about her opinions of attorneys, M.C. mentioned that she hoped that the attorneys would operate in a "decent and respectable manner." When asked how she would feel about the attorneys aggressively cross-examining witnesses, M;C. said she would not penalize the attorneys provided the cross-examination was done in a respectful and professional manner. M.C. told the prosecutor that the respectful conduct of the attorneys was "an important point" for her. In explaining why he excused M.C. from the jury, the prosecutor said he felt it unreasonable for the conduct of the attorneys to influence a juror's judgment of the case and he was concerned that M.C.

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[4] The full names of the prospective jurors are not used to protect their privacy.

would resent an aggressive approach in advocacy. Third, M.C. described herself as a regular member of a church and, when asked if her spiritual practice would prevent her from judging other people, she hesitated. M.C. then explained that she could make a decision based on the evidence, which she contrasted with how she had understood the word "judging" under her Christian faith. The prosecutor cited M.C.'s possible reluctance to sit in judgment of others as grounds for excluding her.

The prosecutor detailed a combination of four reasons for excluding D.J. from the jury. First, the prosecutor said he felt D.J. would "over-intellectualiz[e]" the case and not wait until deliberations to reach a decision, given his statements on voir dire. When D.J. was questioned whether he could keep an open mind and not make a decision until deliberating with his fellow jurors, D.J, said he would "continuously evaluate" the evidence, but that people make decisions and then change them as new information is received. Defense counsel explained to D.J. that "ideally you wouldn't make any decisions at all until you have a chance to discuss the evidence and the testimony with your fellow jurors[.]" D.J. replied: "I really don't think people work that way." In explaining why he exercised a peremptory challenge against D.J., the prosecutor said he thought that D.J.'s "constant decision changing" meant that the prospective juror would "have difficulty arriving at a conclusion here."

The second reason provided by the prosecutor for excluding D.J. from the jury was that D.J. gave a "flip answer." The prosecutor had questioned D.J. about a number of issues, and concluded by asking, "[a]ny other reason you couldn't be fair and impartial to both sides that you can think of?" D.J. replied: "I don't think there was a reason just now. No. There's not a reason right now." The answer apparently evoked laughter in the courtroom. The prosecutor said he was concerned that D.J. had chosen to interpret his question's reference to "any other reason" as an implication that D.J. had already displayed partiality to one side, and sarcastically

replied that "I don't think there was a reason just now."

The third stated ground for excusing D.J. from the jury was D.J.'s general "casualness," evidenced by his "lighthearted banter" with the trial judge. The fourth, and final factor, which the prosecutor said he relied upon was D.J.'s past experience with the adjudication of criminal cases. D.J.'s two brothers and father-in-law are attorneys. One brother is an appellate attorney recently appointed to the Texas Supreme Court. D.J. said he assisted his brother in preparing for argument before the United States Supreme Court in two criminal cases, in which the brother represented defendants. D.J. said that he had "a lot of discussion" with his brother about the criminal cases. The prosecutor was concerned that a juror previously involved on the side of an appellate defender in criminal cases would favor the defense.[5]

The trial court considered defense counsel's *Wheeler/Batson* motion in light of the prosecutor's stated reasons for excluding prospective jurors M.C. and D.J., and denied the motion. We shall assume that the trial court properly found that appellant made a prima facie showing of the presence of purposeful discrimination (step one), and appellant does not dispute that the prosecutor provided facially race-neutral justifications for his peremptory challenges to African-American prospective jurors (step two). (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768.) The issue on appeal is whether appellant has proved purposeful discrimination, which requires an examination of the persuasiveness of the prosecutor's justifications (step three). (*Miller-El v. Cockrell, supra*, 537 U.S. at pp. 338-339.)

In the trial court, the examination of the persuasiveness of the prosecutor's justifications

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[5] On appeal, appellant asserts that recent research has revealed that the cases advocated by D.J.'s brother were actually civil rights cases, not criminal cases. But information about the cases during voir dire came from D.J., who indisputably said he assisted his brother in "criminal cases."

largely turns on an evaluation of whether the prosecutor's facially race-neutral justifications are credible. (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 339.) "Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Ibid.*)

In the appellate courts, a trial court's factual determination' of the absence of discriminatory intent entitled to great deference. (*Miller-El v. Cockrell, supra*, 537 U.S. at pp. 339-340; *Batson, supra*, 476 U.S. at p. 98, fn. 21.) On direct review of a state court judgment, the United States Supreme Court will not overturn a state trial court's finding on the issue of discriminatory intent on a *Batson* motion unless the determination was "clearly erroneous." (*Hernandez v. New York* (1991) 500 U.S. 352, 369 (plur. opn. of Kennedy, J.); *id.* at p. 372 (conc. opn. of O'Connor, J.).) The California appellate courts apply a similar standard of review under *Wheeler*, and defer to the trial court's finding of lack of purposeful discrimination if supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196-197.)

We find no error in the trial court's determination here that appellant failed to carry his burden of proving purposeful discrimination. The trial court closely questioned the prosecutor and weighed the proffered explanations under correct standards, contrary to appellant's claims on appeal. Appellant complains that the trial court misapplied the law because, in ruling on the motion, the court once framed the issue as whether the prosecution's justification for the peremptory challenges was "reasonable." Appellant notes that the proper focus is upon the genuineness of the asserted nonracial motive, not the objective reasonableness of the motive. (*Purkett v. Elem, supra*, 514 U.S. at p. 769.) However, the genuineness of the prosecutor's justification requires an evaluation of credibility, and a factor in judging credibility is "how reasonable, or how improbable, the explanations are." (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 339.) The trial court

properly considered the reasonableness of the prosecutor's explanations in assessing credibility, and the court's use of the word "reasonable" in rendering its ruling does not demonstrate a misapprehension of the proper legal standards.

Appellant also complains that the trial court failed to make detailed findings in denying the motion. Appellant relies on *People v. Silva* (2001) 25 Cal.4th 345, 386, which held that the trial court's obligation to make a "sincere and reasoned attempt to evaluate each stated reason [by the prosecutor] as applied to each challenged juror" is not discharged by a "global finding" that the reasons appear sufficient when "the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both." However, our high court has since clarified that *Silva* does not require a trial court to make explicit and detailed findings for the record every time a *Batson/Wheeler* motion is denied. (*People v. Reynoso, supra*, 31 Cal.4th at p. 929.) "Where, as here, the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible [citation], and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge." (*Ibid.*)

Appellant assails the prosecutor's justification for excusing M.C. and D. J. from the jury, but we find substantial evidence supporting the trial court's finding that the peremptory challenges were exercised without a discriminatory purpose. Appellant argues, as to the exclusion of M.C., that

her initial hesitancy in saying whether, her spiritual beliefs or prior contact with, the criminal justice system in a molestation case would influence her as a juror was overborne by her later, less equivocal statements. But attorneys are entitled to exercise peremptory challenges based upon a prospective juror's first, unguarded responses to questioning, and discriminatory intent cannot be inferred from an attorney's reluctance to credit later responses.

Nor has appellant shown purposeful discrimination in the peremptory challenge of D.J., who the prosecutor said would "over-intellectualiz[e]" the case; evinced a flip and casual attitude; and was a collaborator in a brother's representation of criminal defendants. An attorney may fairly consider a prospective juror's attitude and intellectual proclivities in exercising peremptory challenges without giving rise to an inference of discriminatory intent. (*People v. Reynoso, supra*, 31 Ca1.4th at pp. 924-925 & fn. 6.) Appellant denigrates the prosecutor's use of a peremptory challenge against D.J. as one motivated by a racist distrust of intellectual African-Americans, but the claim is pure invention devoid of record support. Nothing in the record reveals any racist attitude or comments by the prosecutor, nor did appellant make any showing in the trial court that the prosecutor's concern about jurors "over intellectualizing" the case was limited to African-Americans.[6] Substantial evidence supports the trial court's determination that appellant failed

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[6] In fact, the trial court noted that the prosecutor had used a peremptory challenge against a Caucasian prospective juror who, like D. J., appeared well qualified to the court but was also "independent minded." Appellant asks us to engage in additional comparative analyses of the prospective and seated jurors but the trial court made this single comparison, and appellant never presented any such analysis in the trial court. Where, as here, "such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal. . . ." (*People v. Johnson* (2003) 30 Ca1.4th 1302, 1325, cert. granted in part sub nom.

(continued...)

to prove purposeful discrimination in the prosecutor's exclusion of two African-Americans from the jury.

C. Evidence of appellant's prior domestic violence was properly admitted.

Appellant's final claim on appeal is that evidence of his violent crime against his former girlfriend, Daisy Chandra, was wrongly admitted. The evidence was admitted, over objection, under Evidence Code sections 1101 and 1109. Evidence of a defendant's prior misconduct is generally inadmissible, but may be admitted when relevant to prove some fact other than his disposition to commit the charged crime, such as intent. (Evid. Code, § 1101.) Also, if the prior misconduct was the recent commission of domestic violence, that evidence may be admitted where additional acts of domestic violence are charged. (Evid. Code, § 1109, subd. (a)(1). However, the admission of evidence is subject to the protections of Evidence Code section 352, which vests the trial court with discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The trial court admitted the Chandra evidence upon finding it relevant to the prosecution's theory

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(...continued)

Dec. 1, 2003, *Johnson v. California* (2003) _ U.S. _ [2003 WL 22232061].) Defense counsel did argue to the trial court that D.J. was "not the first juror to sort of make a light-hearted remark," that M.C. "gave a similar answer to everybody else" when questioned about her religious beliefs, and that "another juror" shared M.C.'s view that attorneys should behave professionally. These general references do not constitute a meaningful showing sufficient for the trial court, much less for this court, to make a comparative juror analysis. Moreover, the juror comparisons urged on appeal are unrelated to trial counsel's references to these alleged similarities between the responses of seated jurors and challenged jurors.

that appellant killed Biletnikoff because she wanted to end the relationship, and likely told him so when he relapsed and refused to renew his rehabilitation efforts. Appellant's threats to kill Chandra, and violent acts against her, when she ended her relationship with him were thus relevant to proving that appellant murdered Biletnikoff when she likewise indicated an intention to leave him.

Appellant argues that the Chandra evidence was wrongly admitted on several grounds. First, appellant contends that Evidence Code section 1109 violates due process in allowing the admission of prior misconduct to show a propensity to commit a presently charged offense. This court has previously considered, and rejected, this same argument. (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096.) Appellant has not established any reason to reconsider our position.

Second, appellant maintains that the trial court abused its discretion under Evidence Code section 352 in admitting the Chandra evidence. The trial court's ruling on the issue reflects a careful, and sound, balancing of the probative value of the evidence against its potential for undue prejudice. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Appellant argues that the Chandra evidence was not probative of intent because he offered to stipulate at trial that he intended to kill Biletnikoff, and thus evidence relating to his intent became irrelevant. In fact, defense counsel never agreed to any such stipulation, and only indicated a noncommittal willingness to consider a stipulation when suggested by the trial court. Even if appellant conceded his intent to kill, "the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent." (*People v. Steele, supra*, 27 Cal.4th at p. 1243.) Moreover, the Chandra evidence was relevant to premeditation and deliberation, in addition to intent.

The Chandra evidence was offered to show that appellant responds violently to a woman's rejection, and that his violent response is deliberate and not spontaneous. With Chandra, appellant physically

attacked her, threatened to kill her, and abated his violence only after she agreed to reconcile with him. The prosecutor's theory at trial was that appellant acted similarly with Biletnikoff, with the tragic exception that appellant did not stop at threats. While appellant's attacks upon Chandra showed more planning than did his attack upon Biletnikoff, the crimes were not so dissimilar as to make the Chandra evidence irrelevant. Appellant capitalizes on the fact that he is the sole survivor of his Friendship Hall encounter with Biletnikoff to argue that there is no "direct" evidence that Biletnikoff did reject him, as Chandra had done. However, there was substantial evidence that Biletnikoff intended to end her relationship with appellant, and that his relapse and refusal to receive treatment made the breakup necessary to her own recovery. The evidence supported an inference that she expressed her intention to end the relationship during her encounter with appellant, thus making the Chandra evidence highly probative.

Appellant's third, and final, challenge relating to the Chandra evidence is his claim that the standard jury instruction guiding the consideration of evidence of prior domestic violence violates due process in lessening the prosecution's burden of proof. (CALJIC No. 2.50.01.) The California Supreme Court has recently rejected that assertion and found the disputed instruction constitutional. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016.) As appellant acknowledges, the high court's decision forecloses his claim in this court.

DISPOSITION

The judgment is affirmed.

Sepulveda, J.

We concur:

Reardon, Acting P.J.

Rivera, J.

Filed May 12, 2004
Supreme Court
Frederick K. Ohlrich, Clerk
Deputy

Court of Appeal, First Appellate District, Division Four – Nos. A096034/A103966

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MOHAMMED HAROON ALI, Defendant and Appellant.

Petition for review DENIED.

/s/

_____

Chief Justice

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